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Supreme Court of The United States

October Term, 1994

HIRAM WALKER AND SONS, INC.,

Petitioner,

vs.

KIRK LINE, R.B. KIRKONNELL & BRO. LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE; ELLER & COMPANY INC., INDIAN RIVER TRANSPORT, INC.; AND S.S. MORANT BAY, its engines, boilers etc.

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is an independent terminal operator entitled to the benefit of a contractually extended Carriage of Goods by Sea Act (COGSA) (46 U.S.C. App. Section 1304 {5}) limit of liability when performing in a non-maritime situs?

2. Is a contractual limitation of liability rendered null and void by the Harter Act, 46 U.S.C. App. Sections 190, 191 where a terminal operator negligently damages goods after they have been successfully discharged from the ship but before they are properly delivered?

3. Where a terminal operator so unreasonably deviates from the contract in the manner of making delivery that the goods are exposed to greater risk than had been agreed upon is it deprived of the contractual limit of liability under *St. John's Corp. v. Companhia Geral.*, 263 U.S. 119 (1923)?

4. Where a common carrier makes a proper delivery, is an independent subcontractor terminal operator which thereafter damages cargo deprived of a contractually extended limit of liability?

LIST OF PARTIES

The parties to the proceeding are:

Petitioner: Hiram Walker & Sons, Inc. (Parent: Allied Domecq PLC; no nonwholly owned subsidiaries)

Respondent: Eller & Company, Inc.

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PETITION FOR A WRIT OF CERTIORARI
PRELIMINARY STATEMENT

Petitioner, Hiram Walker & Sons, Inc. (Hiram Walker) petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit which affirmed the Judgment of the United States District Court for the Southern District of Florida limiting liability of Eller & Company, a terminal operator, for negligently damaging cargo as a matter of law to $500.00.

OPINIONS BELOW

The Order granting partial Summary Judgment of the United States District Court for the Southern District of Florida, entered December 17, 1986 is unreported (88a). The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Florida dated February 2, 1988 is unreported (73a). The Findings of Fact and Conclusions of Law of the United States District Court for the Southern District of Florida dated August 6, 1990 is unreported (36a). The Order on remand from Court of Appeals of the United States District Court for the Southern District of Florida, entered March 10, 1993 is unreported (21a). The Decision of the Eleventh Circuit Court of Appeals, reversing and remanding is reported. *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508 (11th Cir. 1989) (53a). The Decision of the Eleventh Circuit Court of Appeals, reversing and remanding is reported. *Hiram Walker & Sons, Inc. v. Kirk Line*, 963 F.2d 327 (11th Cir. 1992) (25a). The Decision of the Eleventh Circuit Court of Appeals, affirming is reported. *Hiram Walker & Sons, Inc. v. Kirk Line*, 30 F.3d 1370 (11th Cir. 1994) (1a).

JURISDICTION

The judgment sought to be reviewed was entered on September 1, 1994 (97a).

This Court's jurisdiction to review a Judgment of the United States Court of Appeals for the Eleventh Circuit, affirming the Judgment of the United States District Court for the Southern District of Florida in favor of Petitioner and against Eller & Company in the amount of $500.00 plus interest and costs is invoked pursuant to 28 U.S.C. Section 1254 (l).

This Petition is timely filed within 90 days of the denial by the Eleventh Circuit on November l, 1994 of Petitioner's Petition for a re-hearing (95a).

STATUTES INVOLVED

Section 190 of the Harter Act, 46 U.S.C. App. Section l90, provides:

Stipulations relieving from liability for negligence

It shall not be lawful for the manager, agent, master, or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. Feb. 13, 1893, c. 105, Section 1, 27 Stat. 445.

Section 191 of the Harter Act provides:

Stipulations relieving from exercise of due diligence in equipping vessels

It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence to properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. Feb. 13, 1893, c. 105, Sections 2, 27 Stat. 445.

Section 1301 (e) of the Carriage of Goods by Sea Act (COGSA) 46 U.S.C. App. 1301(e) provides:

Definitions

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship.

Section 1304 (5) of the Carriage of Goods by Sea Act, 46 U.S.C. App. Section 1304 (5) provides:

Amount of liability; valuation of cargo

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount

exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

Section 1311 of the Carriage of Goods by Sea Act, 46 U.S.C. App. Section 1311 provides:

Liabilities before loading and after discharge; effect on other laws

Nothing in this chapter shall be construed as superseding any part of sections 190 to 196 of this title, or of any other law which would be applicable in the absence of this chapter, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship.

STATEMENT OF THE CASE

On March 15, 1985 Hiram Walker purchased 5,000 gallons of Tia Maria from Estate Industries in Jamaica. On March 26, 1985 a 23 ton tank on wheels, similar to a milk or gasoline tank truck, containing the liqueur was rolled aboard the M/V Morant Bay in Kingston in apparent good order and condition. The Morant Bay was operated by Kirk Line under charter. Kirk Line issued a bill of lading to Hiram Walker. The vessel arrived in Miami on March 29, 1985. On that day, Eller & Company (Eller), a stevedore and terminal operator hired by Kirk Line rolled the tank from the Morant Bay to a place of rest on its terminal. It was, at that time, in good order and condition. Hiram Walker contracted with Indian River Transport, Inc. (Indian River) to transfer the liqueur from the Kirk Line tank into its own over-the-road tanker trailer for delivery to New Jersey. Hiram Walker and Indian River agreed that Indian River was to pump the liqueur from the tank into its trailer. On April 1, 1985 the Indian River driver arrived at the pier, was issued several documents including a delivery receipt signed by Eller & Company and countersigned by the driver, David Jones. Jones found that he was missing a fitting in order to connect hoses from the Kirk tank to his own to effect a pump transfer. Unable to do so, he asked an Eller longshoreman employee to help him accomplish a gravity feed. Eller raised the tank on a large fork lift. It fell off the fork lift spilling almost all of its contents.

Petitioner, Hiram Walker, brought this case in the United States District Court for the Southern District of New York pursuant to the admiralty and maritime jurisdiction of the Federal Courts as a maritime or admiralty claim within the meaning of Rule 9 (h) of the Federal Rules of Civil Procedure and pursuant to 28 U.S.C. Sections 1333 (1), 1332, 46 U.S.C. 1301 et. seq. and 49 U.S.C. 11707. It was later removed to the U.S. District Court for the Southern

District of Florida.

Hiram Walker, Kirk Line and Eller agreed that Hiram Walker alone was responsible for arranging a transfer of the Tia Maria from the Kirk Line tank to the Indian River tank. Hiram Walker and Kirk Line had no agreement regarding delivery of the Tia Maria. The bill of lading made no provision regarding delivery. Kirk Line and Eller & Company testified that neither had any obligation to transfer the Tia Maria either by pump or gravity feed. However, Kirk Line testified that it expected Eller to provide whatever services were needed by Hiram to effect a transfer, and Eller's longshoreman testified that in lifting the truck he was under no obligation to do so but just did Indian River a favor. Officers of Hiram Walker, Kirk Line and Eller testified that they had no prior knowledge that Eller was going to raise the tank by fork lift. They would not have approved it if they had known. Eller would not have approved it because it felt it was a dangerous operation. Unbeknownst to Eller or Hiram, Eller's employees had performed gravity feeds before the April 1, 1985 incident in about 1/3 of the cases and used a fork lift in about 15 prior cases.

In 1986 all of the Defendants moved for partial Summary Judgment to limit their liability if any to $500.00 pursuant to the per package limitation contained in the bill of lading. Hiram Walker moved for Summary Judgment against all of the Defendants both on the question of their liability and in opposition to their Motions to limit that liability to $500.00. By Order of December 16, 1986, (88a) the District Court denied the Motions of Eller and Indian River, granted Hiram's Motion for liability against them holding that they were not entitled to limit their liability and granted Kirk Line's Motion to be dismissed from the action holding that there were no grounds upon which it might be held liable since Kirk Line fulfilled its obligations to Hiram at the point where Hiram's liqueur had been safely delivered to Miami,

unloaded from the Morant, and placed in storage. Indian River was held not to be entitled to limit its liability because it was not a carrier within the contemplation of maritime law. Eller was held not to be entitled to a limitation of liability because, in performing the gravity feed, it had acted as a volunteer and not on behalf of Kirk Line. The Court held that transfer of the liqueur from the Kirk tank to the Indian tank was not a function or duty for which Kirk was responsible. Hiram, Eller and Indian River appealed. While the appeals were pending, the District Court held hearings wherein Hiram quantified its damages and on February 10, 1988 the District Court entered Judgment for Hiram Walker against Indian River and Eller in the amount of $147,111.43 plus costs (72a). Indian River thereafter settled with Hiram Walker and the appeals proceeded between Hiram Walker and Eller.

In *Hiram Walker v. Kirk Line et al* (Hiram Walker I), 877 F.2d at 1515-1517 (1989) (64a) the Eleventh Circuit agreed with the District Court that Eller's negligence had been established as a matter of law, but reversed the Judgment because it perceived unresolved questions of fact regarding Eller's eligibility for the $500.00 liability cap. Expressly ignoring the District Court's Order wherein Kirk Line was dismissed because it *had* fulfilled its responsibility, and despite the fact that Kirk Line did not appeal, the Circuit Court focused on Kirk Line's responsibility for the cargo and whether that responsibility had been completely discharged when the spill occurred. It remanded, directing the District Court to determine whether, at the time of the accident, delivery had occurred. The District Court, after a bench trial, entered Judgment in favor of Hiram Walker but this time limited Eller's liability to $500.00, basically because Eller still had custody of the cargo at the time of the loss (35a, 36a). In so holding the Court explicitly disregarded the delivery receipt issued by Eller to Indian River before the accident.

Hiram Walker appealed that decision and again the Eleventh Circuit reversed, *Hiram Walker & Sons v. Kirk Line et al*, 963 F.2d 327 (1992) (Hiram Walker II) (25a), holding that the District Court had misinterpreted the bill of lading as identifying change of custody as the only possible evidence of delivery. It remanded with a direction that the District Court develop any facts that would aid it in determining the point of delivery. On remand, the District Court amended its findings of fact and conclusions of law, found that the delivery receipt was issued either inadvertently or in error, concluded that Eller was trying to effect delivery when the accident occurred and was, therefore, entitled to the $500.00 limitation of liability (21a).

Hiram Walker appealed again. In *Hiram Walker & Sons v. Kirk Line et al*, 30 F.3d 1370 (1994) (Hiram Walker III) (1a), the Circuit Court affirmed the District Court, opining that although delivery receipts are generally highly probative evidence of delivery, the receipt in this case was issued prematurely and mistakenly before completion of delivery. Chief Judge Tjoflat dissented, finding that legal delivery had taken place before the spill since Indian River controlled the process by which the Tia Maria would be transferred and that accordingly Eller was not working on behalf of Kirk at the time of the loss and was not entitled to the $500.00 per package limitation.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS IMPORTANT, UNANSWERED QUESTIONS AND CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT AND STATUTORY LAW

a) Non Maritime Claim

In *Hiram Walker & Sons, Inc. v. Kirk Line* (Hiram Walker I), 877 F.2d at 1511 (57a), the Eleventh Circuit observed that since the accident in question did not occur at a maritime situs, admiralty jurisdiction would not support the claims against Indian River and Eller. As to Eller, jurisdiction was upheld as properly within the pendent-party jurisdiction of the District Court. Specifically, the claim against Eller was sustained because it was sued as a joint tort-feasor with Indian River and the claim against Indian River was properly a federal claim arising under the Carmack Amendment, 49 U.S.C. Section 11707. After the ocean carrier, Kirk Line, had been dismissed from the case because it was held to have fulfilled its obligations to Hiram by safely delivering the liqueur to Miami and placing it in storage, Eller, as a terminal operator, was allowed to limit its liability to $500.00 under COGSA and the parallel provisions of the bill of lading when it almost totally destroyed the cargo by subjecting it to a risk unauthorized by the parties. The District Court, and the Circuit Court below, in sanctioning that result, gave Eller an independent right under COGSA and Harter which Congress never intended.

A carriage of goods by sea involves three stages. The goods are: 1. delivered to a carrier or its agent, 2. loaded to, carried by, and discharged from the vessel, and 3. delivered to a consignee. All stages are governed by the Harter Act, 46 U.S.C. App. Section 190 et seq. The Harter Act took effect in 1893. In 1936 the Congress adopted the Carriage of Goods by Sea Act, 46 U.S.C. App. Section 1301 et seq. (COGSA). By its terms COGSA applies only to that stage of the carriage when the goods are actually on the vessel. COGSA Section 1301 (e). The carrier's custody and care for the goods pre-loading and after discharge but before delivery are governed exclusively by the Harter Act.

By virtue of the bill of lading's "clause paramount"

Kirk Line applied COGSA to all stages of the shipment and at all times that the goods were in the custody of the carrier. However, it could only do so effectively insofar as COGSA did not contradict the Harter Act during those periods of time prior to loading and after discharge, 46 U.S.C. App. Section 1311.

The $500.00 per package limit at issue in this case was either the COGSA limit or a parallel independent provision of the bill of lading found in clause 17 thereof set forth verbatim in *Hiram Walker II* at 963 F.2d 329, note 1 (31a, 32a). It essentially tracks COGSA.

It's application to Eller was found by the Courts below to likewise exist in clause 17. There, the bill of lading's Himalaya clause provided as follows:

> "The limitation of liability and other provisions contained in the article shall inure not only to the agents, servants and employees, but also to the benefit of any independent contractors performing services including stevedoring in connection with the goods covered hereunder."

In *Robert C. Herd & Company, Inc. v. Krawill Machinery Corp.*, 359 U.S. 297 (1959) this Court held that neither the limitation of liability provisions of COGSA nor the parallel provisions of an ocean bill of lading, limiting the liability of the steamship carrier to a shipper to $500.00 per package, protected a stevedore who negligently damaged cargo while attempting to load it aboard the vessel. There, the stevedore dropped a press weighing 19 tons into the harbor while in the process of loading it to the ship. While concluding that there was nothing in the provisions, legislative history and environment of the Carriage of Goods by Sea Act, or in the limitation of liability provisions of the bill of lading to directly extend the benefits of the limitations of liability to the stevedore, the court invited carriers to

extend those provisions by contract to their negligent agents. In the intervening 35 years that invitation has been accepted by carriers in a variety of wordings. The extension has been upheld or rejected in an equally varied set of factual contexts, mainly involving stevedores operating in a clearly maritime situs. *Brown & Root, Inc. v. M/V Peisander*, 684 F.2d 415 (5th Cir. 1981) esp. ns. 17 & 18.

This case presents the important unanswered question of whether a terminal operator which is under no obligation to the carrier to undertake the act which results in damage in a non-maritime situs, although originally engaged by the carrier, nevertheless, enjoys the limitation of liability provisions of an ocean bill of lading and the Carriage of Goods by Sea Act, both clearly maritime in nature and application.

The question is important because those engaged in international trade, whether in the insurance, freight forwarding, merchant or shipping industries, need to have a clear understanding of the risks which flow from their reliance on the maritime laws of the United States.

b. Lack of Clarity

This Court has not directly re-visited this area since *Herd & Co.*, supra. Petitioner respectfully submits that it should do so now. The facts in this case have expanded the envelope concerning the extension of ocean carriers' limitations of liability to their agents to the breaking point. Eller & Company was not operating as a stevedore when it raised the truck off its wheels on a hi-lo and dropped it. The accident happened in what was essentially a parking lot where the Kirk Line truck awaited removal of its cargo by an ICC regulated carrier which alone was responsible to make the transfer. Without authorization by even Eller itself, one of its employees, at the request of Indian River, and simply to accommodate and help Indian River, performed an act

which Eller characterized as dangerous. The questions are presented: Is the Himalaya provision in the Kirk Line bill of lading what this Court intended in *Herd* as a sufficiently clear contracting provision making Eller a beneficiary of COGSA? Is it effective to extend that limitation of liability to "any independent contractors performing services...in connection with the goods covered...(by the bill of lading)", without *ever* mentioning the carrier's obligation to the shipper as the defining criterion? Is the clause a nullity for lack of clarity in failing to identify *whose* independent contractors are meant? See, *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123 (2d Cir. 1978). A literal reading of that phrase could be said to limit the liability of Indian River itself which was clearly not fulfilling Kirk's obligation, but, equally clearly, was performing services in connection with the goods. The Petitioner respectfully submits that such cannot have been the intention of Congress or this Court and that the decisions of the Eleventh Circuit and the District Court distort the maritime law as formulated by this Court, the various circuits, COGSA and the Harter Act itself. Accordingly, this case conflicts with the purpose of COGSA and Harter and the precedents of this Court and the various circuits, and requires guidance on important but unanswered questions of Federal Maritime Law.

c) Delivery

The Hiram Walker trilogy, culminating with the Eleventh Circuit opinion under review including the District Court's Findings of Fact and Conclusions of Law and Final Judgment all dated August 6, 1990 (35a, 36a) and, the District Court's Order on remand from Court of Appeals entered March 10, 1993 (21a) are all fatally flawed. They all pursued the elusive question of whether and when delivery had been accomplished in order to properly position Eller's actions as having taken place either before delivery or after

delivery. That question was further refined into an inquiry as whether Kirk Line's responsibility for the cargo had ended before the spill. But that question had been answered in 1986 when the District Court granted Kirk Line's Motion to Dismiss holding that it "fulfilled its obligations to Hiram at the point where Hiram's liqueur had been safely delivered to Miami, unloaded from the Morant, and placed in storage." (93a). In reality, that was, then, the beginning and the end of the matter. Kirk Line had been dismissed, having been held to have completed its obligations to Hiram Walker and with it, the vicarious entitlement, if any, of Eller to the $500.00 per package cap of the bill of lading. Hiram Walker rested comfortably on that determination which became the law of the case. That determination conformed with long standing maritime law. *F.J. Walker Limited v. Orleans International Inc.*, 561 F.2d 1138, 1142 (5th Cir. 1977); *American President Lines Inc. v. Federal Maritime Board*, 317 F.2d 887, 888 (D.C. Cir. 1962).

Ignoring that conclusion and the dismissal of Kirk Line, the District Court and the Eleventh Circuit in its trilogy continued to treat Eller's obligation as if it were not vicarious and as if Eller were a carrier entitled directly to the benefits of the Harter Act and COGSA. It is not and it was not. That inherent conflict in the cases led to a tremendous amount of mischief, and the trilogy, resulting in the Judgment sought to be reviewed. In essence the dismissal of Kirk Line from this action, which the Petitioner consciously declined to appeal, severed the underpinnings of Eller's further arguments of entitlement to a vicarious $500.00 per package limit. Nevertheless, the Eleventh Circuit and the District Court at its prompting, continued pursuit of that question which had already been answered.

Quite apart from that state of the law of the case after the dismissal of Kirk Line, the continued pursuit of the issue of when delivery occurred by the Eleventh Circuit and the District court should have resulted in the same conclusion:

That delivery had occurred before the spill. All of the *proven* facts lead to that conclusion. The parties did not define between themselves anywhere what constituted delivery. COGSA has no requirement whatsoever concerning delivery. It is undisputed that all parties including Kirk agreed that neither Kirk nor Eller had any obligation to transfer the liqueur. Kirk and Eller admitted in answers to interrogatories unequivocally that delivery had been effected on April 1, 1985 before the accident and that the cargo had been delivered in good order and condition to Indian River, Hiram Walker's agent. Despite all of those facts and despite the actual issuance of a delivery receipt signed by both Eller and Indian River, the District Court and the Eleventh Circuit continued to explore the meaning behind all of those facts and dwelt on the absence of a gate pass to conclude that delivery had not taken place and was actually in the process of occurring when the accident happened. As a consequence, Eller was given the benefit of the limitation. Petitioner submits that the conclusion was in error and conflicts with *F.J. Walker*, and *American President Lines*.

d) Proper Delivery

Assuming that the Courts below were justified in ignoring the dismissal of Kirk Line from the case because it had completed its obligations, and thereafter were correct in pursuing that very question in the absence of Kirk Line, and if they were thereafter correct in concluding that delivery did not take place prior to the spill, there is no question but that the delivery was not proper. Dropping the tank could not be a proper delivery. Neither the parties nor the bill of lading nor COGSA nor the Harter Act define "delivery". "Delivery" only appears in the statutes as a term modified by the adjective "proper". And it appears in the Harter Act, Sections 190 and 191. Petitioner respectfully submits that if delivery is not proper it does not comply with the Harter Act

and it results in a deprivation to the carrier and its subcontractors of the benefits of any limitations of liability. Eller was held liable as a matter of law on account of its negligence. That was, in itself, a highly unusual holding by both the District Court and the Eleventh Circuit since negligence is almost always a question of fact for the trier. However, despite that holding Eller was deemed entitled to limit its liability to $500.00. That conclusion by the Court below directly conflicts with the Harter Act which proscribes any lessening, weakening, or avoiding of a carrier's obligation to carefully handle, care for, and properly deliver cargo.

Section 191 of the Act renders unlawful any agreement whereby the obligations of the master, officers, agents, or servants of the vessel "to carefully handle and stow her cargo and to care for and properly deliver same, *shall in any wise be lessened, weakened or avoided.*" (Emphasis added). Petitioner submits that when Eller, through Kirk Line, was entitled to limit its liability for destroying $146,000.00 worth of cargo to $500.00 its obligations to care for and properly deliver the cargo were substantially lessened and weakened and, essentially, avoided. Petitioner respectfully submits that the most compelling evidence that Congress intended to void any limitation on a carrier's liability under circumstances like those at bar is from the very language of the Harter Act itself. In Section 190 it speaks in terms of relief from *liability*. Section 191, on the other hand, speaks in terms of *obligations* which it mandates cannot be *lessened, weakened, or avoided.* While relief from *liability* does not preclude limiting that liability when it comes to quantifying damages, lessening, weakening or avoiding *obligations* does. An obligation of a carrier extends not only to its legal liability for damaging goods of others, but also to paying for that damage. In short, the Court below rewarded the carrier in a way that Congress forbade.

Petitioner submits that the holding of the Court below also conflicts with the various Circuits that have addressed the question. In *Philip Morris v. American Shipping Co. Inc.*, 748 F.2d 563 (11th Cir. 1984), in a case involving damage sustained by a cargo of tobacco owned by Philip Morris, the tobacco moved to Miami where Maritime Terminal Inc. unloaded the cargo and stored it in its unprotected yard during which time it sustained damage. This was post discharge and, therefore, COGSA did not apply to the case *ex proprio vigore*. While American's bill of lading extended the COGSA provisions including the $500.00 per package limitation to the entire period of time in which the cargo was in the custody of the carrier, the District Court refused to grant the carrier a limitation of liability because it violated the provisions of the Harter Act concerning proper delivery. The Circuit held:

> "The district court properly found that delivery by American to Philip Morris was not effected until the cargo was picked up by Central Truck Lines on January 21, 1980. *Limitations on the carrier's liability are inapplicable if damage occurs due to negligence in the proper delivery of the cargo.*" (emphasis added) (citing cases). *Philip Morris* at 566, 567.

The court went on to hold that because the cargo was not properly delivered, the Harter Act, not the limitation provisions contained in the bills of lading, controls the question of liability. The court continued at 567:

> "To permit American the benefit of the $500 limitation, despite the finding of the district court that American did not exercise due diligence in preventing damage to the cargo, both before it was loaded onto the CRUZ DEL

> SUR and after it arrived in Miami, would immunize the carrier from the adverse consequences of the negligent handling of the cargo."

The holding of the Eleventh Circuit below in the case at bar conflicts with *Philip Morris*, supra and also with the Fifth Circuit Decision in *Baker Oil Tools v. Delta*, 562 F.2d 938 (5th Cir. 1977); rehearing denied 571 F.2d 978, rehearing denied 577 F.2d 1134. There, when goods were lost on a pier before loading onboard the vessel, again at the time when Harter applied of its own force and COGSA did not, the Court held that the carrier did not have a limitation on its liability precisely because the Harter Act forbade it.

e) Deviation

The holding of the Eleventh Circuit below in the case at bar also conflicts with this Court's holding in *St. John's N.F. Shipping Corp. v. S.A. Companhia Geral Commercial Do Rio de Janeiro*, 263 U.S. 119, 124, 44 S.Ct. 30, 31, 65 L.Ed. 201 (1923) and *Nemeth v. General SS Corp. Ltd.*, 694 F.2d 609 (9th Cir. 1982). Eller clearly unreasonably deviated from the agreement Hiram had with Kirk that the liqueur would be pumped.

Hiram did not bargain for, expect, or sanction the risks to which Eller subjected its goods. Neither Kirk, nor Hiram, nor Eller itself knew that the Eller employees would lift the tank. None of them would have approved of the exercise. Eller considered it dangerous. It was, in short, fraught with danger and unorthodox. The consequence of that deviation is loss of any limit of liability. For the Courts below to observe that Eller's employees did the dangerous act carefully on prior occasions does not make it any less a deviation. Nor did it thereby become a custom of the port.

Eller claims its limit through Kirk's bill of lading. By

lifting the tank, Eller broke Kirk's contract with Hiram, exposed the goods to greater risk than had been agreed and thereby caused the loss which would never had happened if a pump had been used. As in *St. John's N.F.*, Kirk, and Eller through Kirk, "became liable as for a deviation, cannot escape by reason of the relieving clauses inserted in the bill of lading...and must account for the value at destination." Id. at 263 U.S. 124, 125.

CONCLUSION

The Decision below conflicts with the purpose of COGSA and the Harter Act and is an unwarranted extension of the principle enunciated in *Herd & Co.* It presents an important unanswered question about what limits, if any, should be imposed on an ocean carrier when it extends the benefits of COGSA and the maritime law of the United States to a non-maritime entity operating in a non-maritime situs, under an ambiguous provision of a bill of lading, where the actions at issue are a breach of the parties' contract. For the foregoing reasons, certiorari should be granted.

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Appendix A

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellant,
v.

KIRK LINE, R.B. Kirkconnell & Bro. Ltd.; Jamaica Merchant Marine, Atlantic Line Ltd.; Eller & Company, Inc.; Indian River Transport, Inc.; and SS Morant Bay, its engines, boilers, etc., Defendants-Appellees.

No. 93-4346.

United States Court of Appeals,
Eleventh Circuit.

Sept. 1, 1994.

Shipper brought action against common carrier and stevedore to recover damages arising from cargo spill. The United States District Court for the Southern District of Florida entered summary judgment for shipper and carrier and stevedore appealed. The Court of Appeals, 877 F.2d 1508, reversed and remanded. The District Court, No. 86-762-CIV-KLR, Kenneth L. Ryskamp, J., entered judgment for stevedore and the Court of Appeals, 963 F.2d 327, reversed and remanded. On remand, the District Court entered judgment for stevedore and shipper appealed. The Court of Appeals, Roney, Senior Circuit Judge, held that finding that delivery receipt was issued inadvertently before stevedore completed delivery of cargo on behalf of ocean carrier and was therefore not probative of delivery, as bearing on stevedore's entitlement to $500 limitation of liability under Carriage of Goods by Sea Act (COGSA) for

destruction of cargo when it fell from forklift, was not clearly erroneous. Affirmed.

Dubina, Circuit Judge, concurred specially with opinion.

Tjoflat, Chief Judge, filed dissenting opinion.

(Keynotes not reproduced)

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and RONEY, Senior Circuit Judge.

RONEY, Senior Circuit Judge:

At issue in this case is whether Eller & Co., Inc., a stevedore and terminal operator, was in the process of delivering cargo on behalf of an ocean carrier, R.B. Kirkconnell & Bro. Ltd. (Kirk Line) when it negligently destroyed the cargo in a forklift accident. The district court, following remand, made certain factual findings and reinstated its earlier judgment, holding that delivery was ongoing at the time of the accident, and that, as a result, Eller's liability was limited to $500 under the Carriage of Goods by Sea Act, 46 U.S.C.App. Section 1304(5), as incorporated into the bill of lading between Kirk Line and the cargo's owner, Hiram Walker & Sons, Inc. (Hiram Walker). Hiram Walker appeals the limitation of Eller's liability, contending that the underlying factual findings are clearly erroneous. We affirm.

I.

This case is before us for the third time. To understand its current posture, it is necessary to review the factual and procedural background in some detail. We begin by reciting the facts as set forth in our prior opinions:

Hiram Walker purchased five thousand gallons of Tia Maria from Estate Industries in Jamaica on March 15, 1985. On March 26, a twenty-three ton tank containing the liqueur was loaded aboard the M/V *Morant Bay* in Kingston, apparently in good order. Kirk Line had chartered the *Morant Bay* ... for a shipment of cargo including Hiram Walker's liqueur, which was shipped under the Kirk Line-Hiram Walker bill of lading. The tank arrived in Miami three days later. Kirk Line hired Eller, a stevedore, to unload the tank from the *Morant Bay* and store it at the dock.

Hiram Walker contracted with [Indian River Transport, Inc. (Indian River)] to transport the liqueur overland to New Jersey; Hiram Walker and Indian River agreed that Indian River was to pump the liqueur from the tank into its freight trailer. On April 1, Jones, an employee of Indian River, arrived at the port to effect the pumping transfer. An Eller employee removed the tank from storage and aligned it with the trailer. Jones attempted to connect the tank and the trailer, but realized that a fitting needed to connect the hoses was missing. Even though another fitting on the back of the tank might have been used to pump the liqueur into the trailer, Jones decided that pumping the liqueur would be impossible; therefore, he asked Marshall, an Eller employee, to help him accomplish a "gravity feed" - essentially, Jones wanted to pour the liqueur from the tank to the trailer. To effect a gravity feed, the tank had to be elevated higher than the trailer. Marshall directed another Eller employee, Wright, to assist Jones. Wright lifted the tank on a large forklift; Wright, however, was not licensed to operate forklifts of this capacity.

Wright and Marshal neglected to put straw mats or other dunnage between the metal forks and the metal container. Fifteen minutes into the operation, the tank apparently began to slide off the forks because of the lack of dunnage. Deciding that the tank was not properly balanced, Marshall instructed Wright to find another forklift. Wright

did not lower the tank, but left the forklift holding the tank suspended eight feet off the ground for ten minutes; leaving a load suspended was a violation of standard company procedure. As Wright returned, the tank fell off the forklift. The tank ruptured, and eighty-five percent of the Tia Maria in the tank spilled out. The liqueur remaining in the tank was contaminated during the cleanup, in which several fire engine companies covered the area with anti-explosive foam.

Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1510-11 (11th Cir.1989) (*Hiram Walker I*).

Hiram Walker sued Eller, among others, for the loss of the cargo. In December 1986, the district court granted summary judgment in favor of Hiram Walker on the issue of liability, finding that Eller had been negligent as a matter of Florida law. The court also considered whether Eller was entitled to COGSA's $500 per container limitation on liability, which was incorporated into the bill of lading between Kirk Line and Hiram Walker, and which, pursuant to a "Himalaya" clause, "inure[d] to the benefit of any independent contractors performing services including stevedoring" for Kirk Line. *(Footnote 1)* The court concluded that the $500 limitation did not apply because Eller, in performing the gravity feed, had acted as a volunteer, not as Kirk Line's independent contractor.

Eller appealed, and in *Hiram Walker I*, 877 F.2d at 1515-1517, we agreed with the district court that Eller's negligence had been established as a matter of law, but reversed the judgment because there remained unresolved factual issues regarding its eligibility for the $500 liability cap. Noting that the bill of lading required Kirk Line to deliver the cargo to Indian River, we held that Eller would be a beneficiary of the Himalaya clause as long as Kirk Line had not completely discharged that responsibility when the spill occurred. We remanded for trial, directing the district court to determine whether, at the time of the spill, delivery had already occurred. If not, then Eller had performed the

gravity feed on Kirk Line's behalf and was entitled to the $500 limitation on liability. If delivery was complete, however, Eller would be deemed a volunteer and there would be no such limitation.

After the resulting bench trial, the district court again entered judgment in favor of Hiram Walker. This time, however, it limited Eller's liability to $500, finding that Kirk Line's responsibility for delivery under the bill of lading had not ended before the spill, and that Eller was therefore performing services on its behalf. Noting that the parties had not defined "delivery", the court made extensive findings of fact regarding the parties' agreements and practices. It found, for example, that although Hiram Walker and Indian River orally agreed that Indian River was responsible for pumping the cargo into its trailer, they had no agreement about how the cargo should be transferred if not pumped. The court found, moreover, that neither the bill of lading, which contained the carriage agreement between Hiram Walker and Kirk Line, nor the oral contract between Kirk Line and Eller for stevedoring and terminal services, specified the method of transferring the cargo to Indian River. From the trial testimony, however, the court determined that Kirk Line expected Eller to provide Indian River "with whatever services were necessary to effect a physical transfer of the cargo", and that Eller had discretion to decide how best to accomplish that task. It further found that Eller had performed gravity transfers in approximately one-third of all deliveries, and that at least fifteen of those deliveries involved the use of a forklift.

In concluding that delivery was not complete before the spill, the district court placed special emphasis on Clause 18 of the bill of lading, which provided that "removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage ... shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading." The court interpreted that

language as precluding the possibility of delivery without a change of custody. Because it was undisputed that Eller had never transferred the cargo into Indian River's custody, the court held that delivery did not occur in this case. In so holding, the court explicitly disregarded evidence that Eller had issued a delivery receipt to Indian River before the accident.

Hiram Walker appealed that decision, and again this court reversed. *Hiram Walker & Sons v. Kirk Line*, 963 F.2d 327 (11th Cir. 1992) (*Hiram Walker II*). Although concluding that the district court's findings of fact were not clearly erroneous, we held that the court had misinterpreted the bill of lading as identifying change of custody as the only possible evidence of delivery. *Id.* at 331. We explained that although Clause 18 provided that change of custody would be prima facie evidence of delivery, Indian River's lack of custody at the time of the spill was not conclusive evidence that delivery had not occurred. Noting that other evidence, such as the delivery receipt, might establish that Kirk Line's delivery obligation was completed before the accident, the case was remanded with instructions that the district court develop any facts that would aid it in determining the point of delivery. We made clear, however, that the delivery receipt was not conclusive evidence of delivery and that its probative value would depend upon the circumstances of its issuance. *Id.* at 332.

On remand, the district court held a status conference at which both parties indicated they had no further evidence to present regarding delivery. Thereafter, the court amended its findings of fact and conclusions of law, stating that "the court has considered the significance of the delivery receipt, in accordance with the Eleventh Circuit's mandate, and has determined that the delivery receipt did not establish the point in time that 'legal delivery' took place." Relying on the trial testimony, the district court found that the issuance of the delivery receipt in this case was either inadvertent or

erroneous because it was inconsistent with Eller's usual practice of issuing such receipts, along with gate passes, only after physical possession of the cargo has passed to the consignee. Because the receipt was issued in error, and there was no other compelling evidence that delivery was complete, the district court concluded that Eller was trying to effect delivery when the accident occurred, and that it was therefore entitled to the $500 limitation on liability. Hiram Walker has again appealed.

II.

[1] The sole issue in this appeal is whether the district court committed reversible error in finding that the delivery receipt was issued inadvertently or erroneously and was therefore not probative of delivery. *(Footnote 2)*

[2,3] As Hiram Walker acknowledges, the challenged finding is one of fact and is therefore reviewed only for clear error. Fed.R.Civ.P. 52. "This court will not disturb a district court's findings of fact under the clearly erroneous standard unless it is left with the 'definite and firm conviction that a mistake has been made' after making all credibility choices in favor of the fact-finder's choice, in light of the record as a whole." *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1481 (11th Cir.1993) (quoting *Maddox v. Claytor*, 764 F.2d 1539, 1545 (11th Cir. 1985). If the district court's finding is plausible in light of the entire record, "the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

Hiram Walker contends that the district court's finding is clearly erroneous because there is no evidence in the record that the delivery receipt was issued erroneously or

that such receipts are customarily issued only after physical transfer of the cargo. This argument is baseless. The district court finding rests on the trial testimony of two Eller employees, Marvin Stephens and Jose Naranjo. Stephens, Eller's manager of operations at the time of the spill, testified as follows:

Q. Now on April 1, 1985, the incident took place where the Tia Maria was spilled. What function was Eller & Company performing at that period of time?
A. They were attempting to deliver the product to Indian River. (R9-61).
Q. Would the delivery have occurred upon the alignment of Tank 24 with the Indian River tank if Indian River could have pumped the cargo?
A. After it was cleared our gate, yes.
Q. What do you mean by that?
A. If all the proper documentation had been made and it was pumped and a gate pass was issued for it to leave our gate and leave the Port of Miami.
Q. Would delivery have occurred by aligning Tank 24 with trailer no. 24 [sic] when the pumping could not occur?
A. No. (R9-83-84).
Q. Is there a point in time when Eller's terminal services for Kirk Line ends that you are aware of, for the handling of cargo?
A. Yes, upon the issuance of a gate pass. (R9-83-84).
Q. Now you say a gate pass wasn't issued in this case, right?
A. That's right.
Q. Do you know if a delivery receipt was issued in this case?
A. I think I saw one.
Q. Is there a difference between the two?
A. Yes. The gate pass allows the unit to leave our facility.
Q. What's the function of the delivery receipt?
A. It is that the cargo has been delivered. (R9-93).
Q. Was it customary on a day-to-day basis for Eller &

Company to sign delivery receipts and to get a receiver, a trucker, to sign a delivery receipt before delivery had been effected? That's my only question. Was that customary to do?
A. No.
Q. And yet it was done in this case, is that what you are suggesting.
A. Evidently. (R9-100-101).
Q. Were delivery receipts issued customarily with shipments of Tia Maria, that is coming into Miami and going off?
A. Yes.
Q. And when ordinarily were those issued?
A. Upon completion of the delivery of the cargo.
Q. And ordinarily the delivery of the cargo of bulk Tia Maria was done by pumping, isn't that correct?
A. Not all the time.
Q. But I mean customarily it was -
A. Not in this case.
Q. I know not in this case. Tank 24 was normally pumped out, wasn't it?
A. I would say probably at least a third of the time it was delivered by a gravity feed. (R9-103).

Stephens's testimony is clear: Eller, contrary to its custom, issued the delivery receipt to Indian River before completion of delivery, which in this case was being performed by gravity transfer. The court reasonably inferred that this departure from custom was a mistake, and that the receipt, therefore, did not establish the time delivery took place.

The testimony of Jose Naranjo, Eller's general traffic manager at the time of the accident, further supports the district court's finding:

Q. Were there times when the pumping couldn't be performed that you are aware of?
A. Yes sir, there were many times.

Q. At any time prior to April 1, 1985, what if anything did Eller do with the Tia Maria when a pump could not occur?
A ... [W]e brought the tank from the lot, the container lot, and brought it alongside the Indian River truck where the tank was transferred through gravity. What we did very simply is we placed it at a higher level than the receiving tank. (R9- 113-114).
Q. Do you think Eller was obligated to lift Tank 24 on the forklifts for this gravity feed in its contract with Kirk Line?
[objection omitted]
A. Eller's responsibility was to deliver the contents of Tank 24 to Indian River and they were to utilize whatever methods were necessary to complete the transfer.
Q. But lifting the tank with a forklift, was that an obligation Eller owed to Kirkconnell?
A. With a forklift or any other equipment that was available.... (R9-116).
Q. Please look at Plaintiff's Exhibit 11. Can you identify that for the court?
A. Yes sir. This is a delivery receipt.
Q. What is the function of the delivery receipt?
A. This delivery receipt is completed after the cargo is delivered to the receiver's trucker.
Q. That appears to be the delivery receipt issued for the Tia Maria that was spilled. Would that have been issued before the spill or after the spill, if you know?
A. Normally this document is issued immediately after the delivery. (R9-117).
Q. Can you think of a reason why there would be the release for this dock receipt signed by the parties prior to the transfer?
[objection omitted]
A. No sir, I couldn't say why. Like I say, normally this is issued after the cargo is delivered.
Q. Could it have been issued because it was anticipated that the cargo would have been pumped?

A. I would say that is the case, yes sir. (R9-118).

[4] Thus, Naranjo, like Stephens, believed that Eller performed gravity transfers, whenever necessary, as a service to Kirk Line, and that the issuance of a delivery receipt before completion of such a transfer was contrary to normal procedures. Even assuming, as Hiram Walker contends, the evidence on this point is not uncontroverted, it is the factfinder's job to weigh the evidence and make necessary credibility determinations. The "clear error" standard of review "imposes an especially heavy burden on the appellant in a case such as this, in which the evidence was largely testimonial, and the district court had the advantage of observing the witnesses and evaluating their credibility firsthand." *Lincoln v. Board of Regents of the University System of Georgia*, 697 F.2d 928, 939 (11th Cir.), *cert. denied*, 464 U.S. 826, 104 S.Ct. 97, 78 L.Ed.2d 102 (1983). Nothing Hiram Walker has presented to this court comes close to satisfying its heavy burden. Having found the testimony of Stephens and Naranjo believable, the district court could easily infer that the receipt was issued inadvertently or in error. This court is not in a position to second guess that finding.

Hiram Walker is mistaken in asserting that "the [delivery receipt] itself hardly bespeaks an inadvertent error." As the district court noted, the face of the receipt does, in fact, suggest that it was issued erroneously. Handwritten across the front of the document are the words "pumped out of Tank # 24 (as per manifest)." Obviously, no such pumping occurred, and the written statement is therefore false. Moreover, the writing implies, consistent with court's finding, that the receipt is meant to confirm that cargo has been successfully transferred. On its face, therefore, the receipt indicates that it was issued prematurely, in the mistaken belief that a successful pump transfer would ensue and that no further services would be required of Eller. Because the anticipated method of delivery proved infeasible,

and Eller was requested to provide additional services, the district court reasonably concluded the receipt had been issued in error and that it did not accurately reflect the point of delivery.

[5] In its amended findings, the district court also considered it important that no gate pass was issued in this case. *(Footnote 3)* The court found, based on the testimony of Naranjo and Stephens, that had Eller acted in accordance with its custom, a gate pass would have issued simultaneously with the delivery receipt. Thus, the court reasoned, the absence of a gate pass further demonstrates that the delivery receipt was issued prematurely.

Hiram Walker contends the district court's finding is clearly wrong because there is no evidence that gate passes and delivery receipts normally issue simultaneously. This argument, too, is unfounded. As shown above, Stephens and Naranjo both testified that when a gravity transfer is performed, the delivery receipt ordinarily issues following the transfer. Stephens added that Eller issues gate passes when it completes its terminal services and the consignee is ready to leave the facility. Although neither witness specifically stated that the documents normally issue at the same time, that can be fairly inferred since Eller's terminal services apparently end when the transfer is complete. The court's finding is therefore not clear error.

Hiram Walker also argues that the district court's emphasis on the gate pass conflicts with this court's statement in *Hiram Walker II*, 963 F.2d at 331, that "the absence of a gate pass ... does little to question the status of the delivery receipt as evidence, though perhaps not prima facie evidence, of *delivery*." That argument, however, ignores the context of the quoted statement. At the time it was made, this court was not addressing whether the delivery receipt had been issued in error - that argument had not been raised. Rather, we were merely explaining that the absence of evidence establishing change of custody, such as a gate

pass, was not conclusive proof that delivery did not occur, and that the district court had therefore erred by apparently ignoring the receipt. In the context of the argument now before us, however, the absence of a gate pass may properly be viewed as limiting the probative value of the delivery receipt because it suggests that the receipt was issued prematurely. The district court's finding, therefore, does not conflict with the law of this case.

We emphasize that this ruling does not depreciate the evidentiary value of delivery receipts. Ordinarily, such a receipt would be strong evidence of delivery. We simply reject Hiram Walker's argument that the issuance of a delivery receipt conclusively proves that delivery occurred. Such an absolute rule is inappropriate in light of situations like this where the evidence strongly indicates that the receipt was mistakenly issued before completion of delivery.

[6] Finally, contrary to Hiram Walker's argument, the district court did not ignore any longstanding practice between the parties in concluding that the gravity transfer was within the scope of Kirk Line's, and thus Eller's, duty of delivery. As noted above, the district court found that Kirk Line expected Eller to provide whatever services were needed to physically transfer the cargo to Indian River, and that it was up to Eller to decide how to accomplish that task. It found, moreover, that Eller performed gravity transfers in approximately one-third of all deliveries, and that forklifts were used at least fifteen times. These findings, all of which have previously been accepted by this court as not clearly erroneous, *Hiram Walker* II, 963 F.2d at 330, support the district court's conclusion that Eller was performing services for Kirk Line, and not as a volunteer, when the spill occurred. AFFIRMED.

Footnotes:

1. Clause 17 of the bill of lading, which contains the Himalaya clause, provides in pertinent part

as follows:

In the case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States per package, or, in case of goods not shipped in packages per customary freight unit the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit or pro rata, in case of partial loss or damage....

The limitation of liability and other provisions contained in the article shall inure not only to the agents, servants and employees, but also to the benefit of any independent contractors performing services including stevedoring in connection with the goods covered hereunder.

2. The plaintiff also argues that delivery was complete, as a matter of law, when the tank was aligned with Indian River's trailer and made available for a pump transfer. That argument, however, was rejected in *Hiram Walker* I, in which we held that undisputed evidence of such alignment was insufficient, in this case, to establish delivery as a matter of law:

When a pumping transfer is effected, delivery may occur when the tank and the trailer are aligned--but it does not necessarily follow that delivery in the case of a gravity feed can finally occur before the last of the liquid is drained into the trailer; the scope of Kirk Line's duty under the bill of lading may thus depend upon the type of transfer that actually is performed. The district court should determine after trial whether Kirk Line's obligations had completely terminated by the time of the spill..877 F.2d at 1517.

3. This court has already accepted as not clearly erroneous the district court's finding that "[n]o gate pass was issued." *Hiram Walker II*, 963 F.2d at 330.

DUBINA, Circuit Judge, concurring specially:

In *Hiram Walker I*, 877 F.2d 1508, 1516-17 (11th

Cir.1989), we held that the stevedore Eller was entitled to the COGSA $500 limitation of liability up until the point at which it delivered the cargo. In *Hiram Walker II*, 963 F.2d 327, 331-32 (11th Cir.1992), we held that the district court erred in treating custody of the cargo as conclusive evidence of delivery and ignoring all other evidence of delivery, in particular the issuance of a delivery receipt. We remanded this case for the district court to make a *factual* determination of delivery based on all the evidence. On remand, the district court found that the delivery receipt had been issued erroneously and contrary to custom and thus provided no evidence of delivery. In sum, the district court found no evidence that delivery had taken place at the time of the accident.

The issues presented in this appeal are what constitutes delivery and whether delivery is a purely factual question or a mixed question of law and fact. Although the panel in *Hiram Walker II* treated it as a purely factual question, in the present appeal Chief Judge Tjoflat's dissent treats it as a mixed question. *(Footnote 1)* Neither COGSA nor the agreements between the parties define delivery. The closest thing to a definition is the provision in clause 18 of bill of lading number 9 which states that "removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage ... shall be prima facie evidence of the delivery . . ." Regardless of whether delivery is a legal or factual question, the district court found no evidence of delivery: custody had not been transferred; the delivery receipt was issued erroneously; and in the case of gravity feeds, delivery receipts customarily were not issued until the completion of the transfer. These factual findings are not clearly erroneous. *(Footnote 2)* In the absence of any factual evidence of delivery, I fail to see how there could have been any delivery, either factual or legal.

While Chief Judge Tjoflat has written a compelling dissent, under the circumstances of this case, I disagree with

his treatment of delivery as a legal question for several reasons. First, *Hiram Walker* II essentially remanded for the district court to make a *factual* finding on delivery. If this court were going to propound a legal definition of delivery, we should have done so in *Hiram* II. Second, Chief Judge Tjoflat cites no authority for his definition of delivery, which he equates with control of the cargo. Third, I disagree with Chief Judge Tjoflat's finding that Indian River controlled the cargo at the time of the accident. I agree that Indian River would have had control if it had proceeded to pump the Tia Maria into its own tank; however, since Indian River did not in fact pump the Tia Maria but rather chose to use a gravity feed transfer, it remained dependent on Eller to effectuate the transfer and thus Indian River did not have control of the cargo at the time of the accident.

For the foregoing reasons, I concur in Judge RONEY's opinion.

1. While I agree with the dissent that the question of delivery can be a mixed question--that is, depending on the circumstances of a given case, delivery can be purely factual or purely legal-- here, given the sparse factual evidence of delivery, I cannot see how legal delivery could have taken place under any common sense notion of delivery.

2. The Seventh Circuit's definition of clearly erroneous is the best I have seen: "To be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must, as one member of the court recently stated during oral argument, strike us as wrong with the force of a five-week old, unrefrigerated dead fish." *Parts and Elec. Motors, Inc. v. Sterling Elec., Inc.*, 866 F.2d 228, 233 (7th Cir.1988).

TJOFLAT, Chief Judge, dissenting:

I respectfully dissent.

This case has been before the district court three times and before this court twice. *See Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508 (11th Cir.1989) ("*HW* I"); *Hiram Walker & Sons, Inc. v. Kirk Line*, 963 F. 2d 327 (11th Cir.1992) ("*HW* II"). Nevertheless, I am convinced that the main issue to be decided - when legal delivery took place - remains unresolved. *(Footnote 1)* It is time that we resolve it.

What must be our focus is not the point of *physical* delivery of the liqueur, that is, when the transfer of the Tia Maria from one container to another was completed; of course, that never happened in this case. *(Footnote 2)* Rather, this case turns on the time at which *legal* delivery occurred: At what point was "Kirk Line's duty . .. fulfilled?" *HW* I, 877 F.2d at 1516; *HW* II, 963 F.2d at 330 n. 3.

General maritime law holds that a carrier's responsibilities include unloading the cargo onto the dock and making it accessible to the consignee. See *F.J. Walker, Ltd. v. Motor Vessel "Lemoncore"*, 561 F.2d 1138, 1142 (5th Cir.1977). *(Footnote 3)* And, although one searches in vain for a conclusive definition of "delivery" in the Harter Act, 46 U.S.C.App. Section 190 (1988), *(Footnote 4)* delivery typically requires nothing more than "discharge of cargo upon a fit and customary wharf." *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166, 168 (5th Cir. Unit B May 1981). Yet, that definition is subject to modification "according to the custom and usage of the port." *Id.*. (quoting *Walker*, 561 F.2d at 1144).

In its post-trial findings of fact and conclusions of law entered after our remand in *HW* I, the district court made two findings of fact that are of some assistance to our understanding of "custom and usage" at the Port of Miami. *(Footnote 5)* First, the district court concluded that, "[a]ccording to an oral agreement between Hiram Walker and Indian River, Indian River was responsible for pumping the Tia Maria cargo into its trailer." In other words, in the

case of a standard, pump transfer, legal delivery took place, at the latest, at the time the two containers were aligned and Indian River was prepared to begin the pump transfer. Second, the district court noted that "Hiram Walker had no agreement with Indian River regarding how the liqueur should be transferred if it were not pumped." Thus, in the absence of a pump transfer, Hiram Walker and Indian River had not agreed contractually to a point of legal delivery. It might well be that legal delivery took place at the time the containers were aligned, just as in a pump transfer; it is equally conceivable, however, that legal delivery would have taken place only after the liqueur physically had passed from one container to a second.

Earlier, it appeared that the delivery receipt might be probative as to the point of legal delivery; now, however, it appears that the receipt may be of no use to us in resolving this contentious issue. *(Footnote 6)*

In the absence of a probative delivery receipt, then, we must turn to indicia of control. The facts reveal that, as of the time at which Eller aligned the tank car with Indian River's truck, Indian River controlled the direction of events. Indian River's driver could have provided the device by which the Tia Maria would be pumped from the tank. Having failed to bring that device, he could have directed that Eller leave the tank car in place in order that he might obtain the necessary pumping attachment. Or, as eventually occurred, he could have directed that Eller accomplish a gravity feed. Moreover, the Indian River driver could have stopped the gravity feed at any time and, after obtaining the necessary equipment, performed a pump transfer.

Thus, through it all, Eller's actions were dictated by Indian River's driver. Control of the process by which the contents of the tank would be transferred rested with Indian River and, with it, control of the Tia Maria itself. Legal delivery had taken place.

Eller's liability is not at issue; that was settled years

ago. The amount of damages also is not questioned. I, therefore, would remand to the district court with the instruction that judgment be entered on behalf of Hiram Walker and against Eller for the complete injury suffered without regard to the $500 COGSA limitation.

1. I believe the issue we must examine on appeal (when legal delivery took place) to be broader than that presented in the majority opinion (whether the district court was clearly erroneous in finding that the delivery receipt was issued inadvertently). *See Ante* slip opinion at 3353. Accordingly, I believe our standard of review to be *de novo* as the determination of legal delivery is a question of law (or, at the least, a mixed question of law and fact), not a question of fact subject to a clearly erroneous standard.

2. The district court's amended findings of fact and conclusions of law, entered after our remand in *HW* II, belie its continued treatment of change of custody and legal delivery as interchangeable: "As long as the Tia Maria remained in Tank # 24, it had not been delivered to Hiram Walker's agent, Indian River." Amended Conclusion of Law No. 8. It is the district court's mistaken equivalence of these concepts that mandates appellate *de novo* review.

3. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent decisions of the former Fifth Circuit handed down prior to October 1, 1981.

4. The Harter Act defines the duty of care from the time goods are discharged from the ship until they are delivered to the consignee. See *Allstate Ins. Co. v. Imparca Lines*, 646 F.2d 166,168 (5th Cir. Unit B May 1981).

5. We have accepted the findings of fact in the district court's first opinion on remand as not clearly erroneous. *HW II*, 963 F.2d at 330.

6. Delivery receipts, the district court correctly concluded, typically were issued only after physical delivery, regardless of the means of transfer (pump or gravity). Thus, in the case of a pump transfer, although

physical delivery of the liqueur and the issuance of the delivery receipt were closely conjoined, there was no nexus between the legal delivery of the Tia Maria and issuance of the delivery receipt. Eller has not demonstrated--and the district court has not found-- that the delivery receipt is of any greater probative value in determining the point of *legal* delivery for gravity transfers either.

Appendix B

MAR 10 1993
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 86-0762-CIV-RYSKAMP

HIRAM WALKER & SONS, INC.,
Plaintiff,

v.

KIRK LINE, R.B. KIRKCONNELL & BRO., LTD., Eller & Company, Inc., et al.,
Defendants.

ORDER ON REMAND FROM COURT OF APPEALS

THIS CAUSE came before the Court upon Defendant Eller's Motion for Status Conference, after an order of remand and reversal from the Eleventh Circuit. Hiram Walker & Sons v. Kirkline et al., 963 F.2d 327 (11th Cir. 1992). A status conference was held on September 25, 1992.

The Court has reviewed the Eleventh Circuit's order and the pertinent portions of the record, and enters the following amendments to its prior Findings of Fact and Conclusions of Law, rendered August 6, 1990. The purpose of these amendments is to clarify that the Court has considered the significance of the delivery receipt, in accordance with the Eleventh Circuit's mandate, and has determined that the delivery receipt did not establish the point in time that "legal delivery" took place. Because delivery in the legal sense had not taken place at the time of the accident which destroyed 5000 gallons of Tia Maria, the stevedore, Eller & Company, is entitled to $500 limitation

of liability.

AMENDED FINDINGS OF FACT

(1) This Court finds that execution of the delivery receipt prior to physical transfer of the cargo was either issued inadvertently or erroneously.

(2) In terms of ordinary custom and practice, delivery receipts and gate passes are usually issued only after physical transfer of the cargo from the shipper to the consignee. (See December 4, 1989 trial testimony of Jose Naranjo and Marvin Stephens, pp. 100-102 and 117-118). This undisputed evidence confirmed that it was the usual practice of Eller & Company to issue the delivery receipt and gate pass after physical possession of the cargo had been transferred to the consignee.

(3) The Court concludes that the person who executed the receipt earlier did so in error, and that the delivery receipt was not evidence of legal delivery of the Tia Maria.

(4) Reconstructing the sequence of events, the Court finds that, before the accident, an Eller employee inadvertently or erroneously issued a delivery receipt to the Indian River driver stating that the Tia Maria was "pumped out of tank #24 (as per manifest)." Plaintiff's Exhibit No. 11. As of the moment when it was issued, the delivery receipt did not reflect the actual location or possession of the cargo. The Tia Maria had not yet been pumped out of the tanker when the receipt was issued.

(5) No gate pass was ever issued, even though custom and practice dictate that both this pass and the delivery receipt should have been issued simultaneously.

AMENDED CONCLUSIONS OF LAW

(1) The mere fact that a delivery receipt was issued

does not persuade the court that actual delivery had taken place.

(2) Because the undisputed evidence confirms that the receipt was issued before the physical transfer of the cargo from the possession of the shipper to the consignee, despite the undisputed evidence that it was Eller's custom and practice to issue both the delivery receipt and the gate pass only after transfer of the physical possession of the cargo, the Court cannot determine why the delivery receipt in this case was issued before the transfer of the Tia Maria.

(3) However, based on Eller's custom and practice, the Court concludes that only the issuance of a gate pass would have completed delivery, and this pass was never issued, since delivery was aborted by the accident.

(4) Thus, the uncertainty surrounding the issuance of the delivery receipt lacks legal significance. If the receipt plus the gate pass had been issued, then this Court might find that completed delivery had taken place. The weight of the testimony plus the absence of the gate pass precludes such a finding.

(5) The Eleventh Circuit held in its opinion in this case that the absence of a change of custody of cargo did not compel a finding of absence of delivery for purposes of determining whether the carrier's duty was fulfilled before cargo spill occurred.

(6) This Court's findings are not at variance with the Eleventh Circuit's holding. This Court does not rely upon the absence of change in custody of the Tia Maria.

(7) Rather, the Court relies upon the evidence presented at trial of custom and practice which indicates (1) that in this case, the delivery receipt was issued prematurely and (2) that in this case, as between these particular parties, only the issuance of a gate pass would have indicated a completed, normal delivery.

(8) As long as the Tia Maria remained in Tank #24, it had not been delivered to Hiram Walker's agent, Indian

River.

(9) Thus, the accident occurred in the process of making the delivery to Hiram Walker which, and thus the accident was the ocean carrier's responsibility.

(10) For all the foregoing reasons, this Court again concludes that Eller & Company are entitled to the $500 COGSA limitation.

(11) This Court's Findings of Fact entered on August 6, 1990 are hereby AMENDED to include the above Findings of Fact and Conclusion of Law, following the mandate of the Eleventh Circuit.

(12) This Court's Judgment entered August 6, 1990 is hereby ADOPTED and REINSTATED.

DONE AND ORDERED in chambers at the United States District Court, West Palm Beach, Florida, this 10th day of March, 1993.

Kenneth L. Ryskamp
United States District Judge

Appendix C

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellant,
v.

KIRK LINE, R.B. KIRKCONNELL & BRO., LTD., et al., Defendants,

Eller & Company, Inc. Defendant-Appellee.

No. 90-5699.

United States Court of Appeals,
Eleventh Circuit.

June 17, 1992.

Shipper brought action against common carrier and stevedore to recover damages arising from cargo spill. The United States District Court for the Southern District of Florida entered summary judgment for shipper. Carrier and stevedore appealed. The Court of Appeals, 877 F.2d 1508, reversed and remanded. The District Court, No. 86-762-CIV-KLR, Kenneth L. Ryskamp, J., entered judgment for stevedore. Shipper appealed. The Court of Appeals, Tjoflat, Chief Judge, held that absence of change of custody of cargo did not compel finding of absence of delivery, for purposes of determining whether carrier's duty was fulfilled before spill occurred so that stevedore could not be an independent contractor performing services under bill of lading at time of accident and would not be entitled to $500 limitation of Carriage of Goods by Sea Act (COGSA).

Reversed and remanded.

(Keynotes not reproduced)

Appeal from the United States District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and HENDERSON, Senior Circuit Judge.

TJOFLAT, Chief Judge:

Hiram Walker & Sons, Inc. (Hiram Walker) appeals from a final judgment of the United States District Court for the Southern District of Florida holding that Eller & Company, Inc. (Eller), a stevedore and terminal operator, was an "independent contractor performing services" for R.B. Kirkconnell & Bro., Ltd. (Kirk Line), an ocean carrier, and therefore entitled to limit its liability to $500 under section 4(5) of the Carriage of Goods by Sea Act, ch. 229, 49 Stat. 1207 (1936) (codified as amended 46 U.S.C.App. Section 1304(5) (1988)) (COGSA).

We reverse and remand for proceedings in accordance with this opinion.

I.

Hiram Walker sued Eller, among others, to recover for the loss of a shipment of five thousand gallons in bulk of Tia Maria Liqueur. On appeal from the district court's summary judgment against Eller, we held Eller liable as a matter of law, but reversed and remanded, instructing the district court to determine whether Eller functioned as an "independent contractor performing services" for Kirk Line at the time of the spill and therefore was entitled to a $500 liability cap. *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1516 (11th Cir. 1989). We specifically called on the district

court to "determine after trial whether Kirk Line's obligations had completely terminated by the time of the spill...." Id. at 1517.

For a more detailed rendition of the accident, we turn to our prior opinion:

Hiram Walker purchased five thousand gallons of Tia Maria from Estate Industries in Jamaica on March 15, 1985. On March 26, a twenty-three ton tank containing the liqueur was loaded aboard the M/V Morant Bay in Kingston, apparently in good order. Kirk Line had chartered the Morant Bay from its proprietor, [Jamaica Merchant Marine Atlantic Line, Ltd. (Jamaica Line)], for a shipment of cargo including Hiram Walker's liqueur, which was shipped under the Kirk Line-Hiram Walker bill of lading. The tank arrived in Miami three days later. Kirk Line hired Eller, a stevedore, to unload the tank from the Morant Bay and store it at the dock.

Hiram Walker contracted with [Indian River Transport, Inc. (Indian River)] to transport the liqueur overland to New Jersey; Hiram Walker and Indian River agreed that Indian River was to pump the liqueur from the tank into its freight trailer. On April 1, Jones, an employee of Indian River, arrived at the port to effect the pumping transfer. An Eller employee removed the tank from storage and aligned it with the trailer. Jones attempted to connect the tank and the trailer, but realized that a fitting needed to connect the hoses was missing. Even though another fitting on the back of the tank might have been used to pump the liqueur into the trailer, Jones decided that pumping the liqueur would be impossible; therefore, he asked Marshall, an Eller employee, to help him accomplish a "gravity feed"- essentially, Jones wanted to pour the liqueur from the tank to the trailer. To effect a gravity feed, the tank had to be elevated higher than the trailer. Marshall directed another Eller employee, Wright, to assist Jones. Wright lifted the tank on a large forklift; Wright, however, was not licensed

to operate forklifts of this capacity.

Wright and Marshall neglected to put straw mats or other dunnage between the metal forks and the metal container. Fifteen minutes into the operation, the tank apparently began to slide off the forks because of the lack of dunnage. Deciding that the tank was not properly balanced, Marshall instructed Wright to find another forklift. Wright did not lower the tank, but left the forklift holding the tank suspended eight feet off the ground for ten minutes; leaving a load suspended was a violation of standard company procedure. As Wright returned, the tank fell off the forklift. The tank ruptured, and eighty-five percent of the Tia Maria in the tank spilled out. The liqueur remaining in the tank was contaminated during the clean-up, in which several fire-engine companies covered the area with anti-explosive foam.

Hiram Walker, 877 F.2d at 1510-11.

On remand, the district court determined after trial that Kirk Line's obligations had not completely terminated by the time of the spill. It found that Eller was an "independent contractor performing services" under the "Himalaya" clause in Kirk Line's bill of lading with Hiram Walker, which limits liability to $500 "per customary freight unit" and provides that the "limitation of liability [to $500 per unit] shall inure ... to the benefit of any independent contractors performing services including stevedoring in connection with the goods covered hereunder." *(Footnote .)* The bill of lading's clause paramount further incorporated COGSA, which also limits liability to $500 for any "customary freight unit." *(Footnote 2)* Since the dropped tank of Tia Maria constituted a customary freight unit, see id., the district court capped Eller's liability at $500.

The district court made extensive findings of fact, all of which we accept as not clearly erroneous. The court found

that, although "[a]ccording to an oral agreement between Hiram Walker and Indian River, Indian River was responsible for pumping the Tia Maria cargo into its trailer[,] Hiram Walker had no agreement with Indian River regarding how the liqueur should be transferred if it were not pumped." The court further found that "Hiram Walker's agreement with Kirk Line is contained in bill of lading number 9, which contains no provision regarding the method for transferring the liqueur from Tank 24 to the Indian River trailer." The court noted, however, that clause 18 of the bill of lading provides that "removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage ... shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading." Finally, the court found that "[b]efore the accident, an Eller employee issued a delivery receipt to the Indian River driver, stating that the cargo was pumped out of Tank 24 (as per manifest),'" but that "[n]o gate pass was issued."

At the outset of its conclusions of law, the district court correctly acknowledged that "[t]his action is governed by the terms of the bill of lading issued for Tank 24 and the provisions of COGSA." Guided by our prior opinion in this case, *(Footnote 3)* the district court also correctly identified delivery as the linchpin of the question we had instructed it to address. In order to determine the time at which Kirk Line's obligations had completely terminated, it would have to pinpoint the time at which delivery had occurred. *(Footnote 4)*

The court stumbled not in charting its road, but in traveling it. Explicitly disregarding its fact finding that a delivery receipt was issued, the court mistakenly interpreted the quoted language in clause 18 of the bill of lading as compelling the conclusion that Eller had not completed delivery at the time of the spill: "Considering [the quoted] language, the court concludes that delivery did not occur

before the accident, because Indian River had not removed the Tia Maria from Tank 24 into its custody. By linking delivery to custody, the parties agreed that actual delivery of the cargo would be required before Kirk Line's responsibilities ended."

The court's reading of clause 18 turned on an incorrect interpretation of the phrase "prima facie evidence." The court, in effect, took clause 18 as identifying change of custody not only as conclusive, but also as the only possible evidence of delivery. *(Footnote 5)* While clause 18 did link custody to delivery, it did not equate the two at the exclusion of all other possible evidence of delivery. It was only the court's improperly categorical reading of clause 18 that permitted it to ignore the delivery receipt as evidence of delivery. Clause 18 does not concern itself with the question of when delivery has not occurred, but with the question of when delivery has occurred. Absence of custody change, however, implies absence of delivery only if delivery cannot occur without a change in custody. Clause 18, however, says no such thing. Instead of identifying custody change as the *conditio sine qua non* of delivery, it marks custody change as *primus inter pares* of all possible evidence of delivery. *(Footnote 6)*

Once the connection between custody change and delivery is loosened in this way, it becomes obvious that the absence of custody change does not compel a finding of absence of delivery. By the terms of the bill of lading, absence of custody change simply means that the prima facie evidence of delivery identified in clause 18 is not available. We therefore look to other evidence of delivery and come upon the delivery receipt issued prior to the spill. Once it is agreed that delivery does not stand or fall on custody change, the absence of a gate pass - which would have constituted conclusive evidence of change of custody - does little to question the status of the delivery receipt as evidence, though perhaps not prima facie evidence, of delivery.

Hiram Walker concedes that Eller had custody at the time of the spill. Assuming that Eller had custody and that therefore no custody change had occurred that would have constituted prima facie evidence of delivery, *(Footnote 7)* we search the district court's fact findings in vain for indications that the delivery receipt documented anything other than delivery. The passing remark that "[t]he mere fact that a delivery receipt issued does not persuade the court that actual delivery occurred" will not do once the custody determination is stripped of its dispositive pretenses.

We refrain from making a factual determination regarding the point of delivery, which is better left to the district court. On remand, we instruct the district court to develop any facts that would aid it in making this determination, including, for example, the precise time at which the delivery receipt was issued. Issuance of the delivery receipt prior to the time Hiram Walker claims delivery was completed - the moment the tank had been aligned with the trailer - might lessen the delivery receipt's probative value. A finding that Indian River and Eller customarily, or by agreement, completed delivery receipts prior to delivery could have a similar effect.

For the above stated reasons the judgment of the district court is REVERSED and the case is REMANDED for proceedings in accordance with this opinion.

REVERSED AND REMANDED.

1. Clause 17 provides in pertinent part:
In the case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States per package, or, in case of goods not shipped in packages per customary freight unit the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package

or per customary freight unit or pro rata, in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss of damage shall be adjusted pro rata on the basis of such declared value. The limitation of liability and other provisions contained in the article shall inure not only to the agents, servants and employees, but also to the benefit of any independent contractors performing services including stevedoring in connection with the goods covered hereunder.

2. In pertinent part, section 4(5) of COGSA provides: Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier. 46 U.S.C.App. Section 1304(5) (1988).

3. The question thus presented is whether Kirk Line's duty was fulfilled when Eller aligned the tank with Indian River's truck; if so, Kirk Line had completed its responsibilities under the bill of lading before the spill had occurred, and Eller could not be said to have been an "independent contractor performing services" under the bill of lading at the time of the accident. If, however, because of Indian River's failure to secure the proper fitting, delivery was not completed by the mere alignment of the tank with the trailer, then Kirk Line's duty of delivery would have continued and Eller would

have been "an independent contractor performing services" under the bill of lading at the time of the spill, entitled to the $500 limitation. *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1516 (11th Cir.1989) (emphasis supplied).

4. Eller argues that custody change, not delivery, constitutes the relevant occurrence for determining the scope of Kirk Line's obligations to Hiram Walker. In support, Eller points to the clause paramount of the bill of lading, which provides that "[t]he provisions stated in [COGSA] (except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the carrier." (Emphasis supplied.) In its findings of fact, the district court did opine that "[u]nder the clause paramount, Kirk Line's liability to Hiram Walker is limited to $500 per package during the entire time period that Kirk Line had custody of Tank 24." (Emphasis supplied.) In its conclusions of law, however, the court focussed not on the clause paramount, but on clause 18 of the bill of lading, and sought to determine whether delivery, not custody change, had occurred at the time of the spill. Although the court considered absence of custody change conclusive evidence of absence of delivery and conflated the two occurrences in the process, see infra slip op. pp. 2757-60, it nevertheless set out ultimately to determine the point of delivery, not of custody change. Our previous opinion specifically instructed the district court to determine the point of delivery, Hiram Walker, 877 F.2d at 1516, and we see no reason now to shift the focus onto custody. While the clause paramount rendered COGSA applicable until the point of custody change, the district court specifically found that "the parties agreed [in clause 18] that actual delivery of the cargo would be required before Kirk Line's responsibilities ended." (Emphasis supplied.) Although COGSA remained applicable following delivery, but prior to change of custody, Eller could at that time no longer claim the benefit of the damage cap in section 4(5) of COGSA and in clause 17 of the bill of lading,

because it was no longer an "independent contractor performing services" for Kirk Line.

5. It is well settled that prima facie evidence differs from both conclusive evidence, and the only possible evidence, of a given occurrence. See, e g., *Associated Metals and Minerals Corp. v. Etelae Suomin Laiva*, 858 F.2d 674, 677-78 (11th Cir. 1988) (interpreting COGSA § 3(6); prima facie evidence "accorded no special weight" upon introduction of sufficient contrary evidence) (quoting *Harbert Int'l Establishment v. Power Shipping*, 635 F.2d 370, 373 (5th Cir. Unit B 1981); *Miller v. Norvell*, 775 F.2d 1572, 1574 (11th Cir. 1985)), cert. denied, 476 U.S. 1126, 106 S.Ct. 1995, 90 L.Ed.2d 675 (1986) ("Prima facie evidence means evidence of such nature as is sufficient to establish a fact and which, if unrebutted, remains sufficient for that purpose."). The very COGSA provision the benefit of which Eller seeks distinguishes prima facie from conclusive evidence: Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package ..., unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier. 46 U.S.C.App. Section 1304(5) (emphasis supplied).

6. Strictly speaking, more than one occurrence may constitute prima facie evidence of another.

7. Hiram Walker, somewhat self-defeatingly, urges us to find that Kirk Line no longer had custody at the time of the spill. In conjunction with Hiram Walker's concession that Eller had custody at the time of the spill, this finding would make for a change of custody, which in turn would constitute prima facie evidence of delivery. In that case, however, Kirk Line's obligations would have terminated long before the spill, namely at the moment custody transferred from Kirk Line to Eller.

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO:86-0762-CIV-RYSKAMP

HIRAM WALKER & SONS, INC., Plaintiff,

v.

KIRK LINE, R.B. KIRKCONNELL & BRO., LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE, LTD.; ELLER & COMPANY, INC.; INDIAN RIVER TRANSPORT, INC.; and the S/S MORANT BAY, its engines, boilers, etc. Defendants.

FINAL JUDGMENT IN FAVOR OF PLAINTIFF

THIS MATTER came for a trial before the court. The issues having been duly tried and a decision duly rendered, it is hereby:

ORDERED and ADJUDGED that final judgment is entered in favor of plaintiff and against defendant Eller & Company, Inc., as set forth in the court's order of August 1, 1990. The order of August 1, 1990, is expressly adopted and incorporated by reference. Accordingly, the plaintiff shall recover of defendant Eller & Company, Inc. the sum of $500; prejudgment interest on that amount from the date of loss April 1, 1985, Argonaut Ins. Co. V. May Plumbing Co., 474 So.2d 212 (Fla. 1985); and costs of the action.

DONE and ORDERED at the United States District Court, Miami, Florida, this 6 day of August, 1990.

Kenneth L. Ryskamp
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO:86-0762-CIV-RYSRAMP

HIRAM WALKER & SONS, INC., Plaintiff,
v.
KIRK LINE, R.B. KIRKCONNELL BRO., LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE, LTD.; ELLER & COMPANY, INC.; INDIAN RIVER TRANSPORT, INC.; and the S/S MORANT BAY, its engines, boilers, etc. Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came before the court for trial on December 4, 1989. Having considered the testimony and other evidence presented, the court enters its findings of fact and conclusions of law pursuant to Rule 52 of the Federal Rules of Civil Procedure.

A. BACKGROUND

Plaintiff Hiram Walker & Sons, Inc. ["Hiram Walker"] brought this action to recover for the loss of a shipment of Tia Maria liqueur transported from Kingston, Jamaica to the Port of Miami, Florida.[1] The liqueur spilled as it was being transferred from a bulk tank to a trailer. Defendants were

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[1] Aetna, Hiram Walker's insurer, paid the entire loss and thus is the real party in interest. The court constructively joined Aetna as a party plaintiff, which the Eleventh Circuit determined was within the court's discretion . Hiram Walker & Sons, Inc. v. Kirk Line et al., 877 F.2d 1508, 1510 n.1 (11th Cir. 1989)

R.B. Kirkconnell & Bro., Ltd., the ocean carrier operating under the trade name Kirk Line ["Kirk Line"]; Jamaican Merchant Marine Atlantic Line, Ltd. ["Jamaican Merchant Marine"], the owners of the M/V Morant Bay, the vessel on which the tank containing the liqueur was transported; Eller & Co. ["Eller"], the stevedore and terminal operator in Miami; and Indian River Transport, Inc. ["Indian River"], the inland trucking company hired by Hiram Walker to pick up the cargo in Miami and transport it to New Jersey.

In an earlier order, this court dismissed Kirk Line and Jamaican Merchant Marine and found defendants Eller and Indian River jointly and severally liable to Hiram Walker. Hiram Walker & Sons Inc. v. Kirk Line, No. 86-0762-CIV-RYSKAMP, Order Granting Partial Summary Judgment (S.D. Fla. Dec. 17, 1986). The court then held a trial on damages and determined that Hiram Walker was entitled to damages in the amount of $147,111.43, to be apportioned equally between Eller and Indian River.

On appeal, the Eleventh Circuit reversed the summary judgment and remanded for further proceedings on a number of issues. Hiram Walker & Sons, Inc. v. Kirk Line, 877 F.2d 1508, 1516 (11th Cir. 1989). Before trial on remand, Hiram Walker and Indian River settled their dispute, and Indian River was dismissed from the suit with prejudice. Consequently, Eller was the sole remaining defendant at trial on remand.

Regarding Eller's purported negligence, the Eleventh Circuit agreed with this court's conclusion that Eller's negligence in performing the transfer was established under Florida law. Hiram Walker, 877 F. 2d at 1515 . The issue on remand was whether Eller was entitled to limit its liability to $500 pursuant to section 4(5) of the Carriage of Goods by Sea Act ["COGSA"], ch. 229, 49 Stat. 1207 (1936) (codified as amended 46 U.S.C. App. § 1304(5) (1982 and Supp. V 1987)). As the Eleventh Circuit framed the question, the resolution of this issue required a determination of whether

Kirk Line's responsibilities under the bill of lading had terminated and whether delivery of the liqueur was complete when it spilled. Hiram Walker, 877 F.2d at 1516. If so, Eller could not claim the liability limitation as it was not then acting as Kirk Line's "independent contractor." If delivery had not been completed, however, Eller would be entitled to COGSA's $500 package limitation as a third party beneficiary of a clause in the bill of lading.

B. FINDINGS OF FACT

In 1972, Kirk Line and Eller entered into an oral agreement under which Eller would provide agency, stevedoring, and terminal operating services to Kirk Line at the Port of Miami. Eller billed Kirk Line for its stevedoring services in one invoice. Eller billed Kirk Line for its terminal operations under separate invoice.

Regarding the bulk tank involved in this case, Eller billed Kirk Line $74.74 for "trailer handling" of the full trailer. Plaintiff's Exhibit No. 48. Kirk Line billed Hiram Walker $200.00 for handling on the bill of lading. Plaintiff's Exhibit No. 1. Eller's charges for trailer handling were governed by the trailer handling bill, which constituted its contract with Kirk Line. Plaintiff's Exhibit No. 57 at 9, 24. The charge for trailer handling meant that Eller "was responsible for delivering the trailer or its product to the consignee or its agents." Id. at 25. The amount Eller charged for trailer handling on Tank 24 would not vary, whether or not a forklift was used to perform a gravity feed. Id. at 25-26. The trailer handling charge also included Eller's handling of the empty tank. Id. at 11.

Beyond the trailer handling bill that Eller issued to Kirk Line, handling services performed by Port of Miami terminal operators at the time of the accident were governed by Tariff No.4 of the Port of Miami Freight Handlers, effective October 1, 1982. Plaintiff's Exhibit No. 46 at 3,

para. 12. Tariff No. 4 defined "terminal handling" as follows:

Handling between point of rest of terminal and transporting conveyance or vice versa.

The service of handling cargo to or from the terminals, to or from trucks, trailers or other highway type of conveyance. Hand stacking or unstacking of cargo in conveyances is not included in rates as shown under this classification. When hand stacking or unstacking is required, such services will be provided under Item No.7.

When cargo is handled to the terminal from railroad cars or vice versa, the tariff charges shown under this classification will apply where such handling service can be accomplished with mechanized equipment (lift trucks,etc.).

If hand stacking or unstacking is required, double the prevailing rate will apply.

On any handling from the terminals to railroad equipment, or vice versa, the tariff rates will include the handling (loading or unloading) only, and any labor and/or material cost for cleaning or securing will be billed additionally as per Item No. 7.

Should distance between point of rest and cargo conveyance exceed 250 Feet, Freight Handlers reserve the right to negotiate a cost-plus labor operation in lieu of rates shown.

These services also apply to services performed in connection with the receiving or delivering of automobiles, trucks, buses, or other wheeled vehicles received or delivered under their own power.

In all cases, Eller's responsibility for terminal operations would end when a gate pass was issued for the cargo to leave the terminal and the Port of Miami facility. Transcript of Trial Dec. 4, 1989, at 82.

On or before March 26, 1985, the shipper Estate Industries loaded Tank 24, a 40-foot bulk tank owned by Kirk Line, with Tia Maria liqueur. On March 26, 1985,

Tank 24 was loaded aboard the M/V Morant Bay in Kingston, Jamaica. Kirk Line issued bill of lading number 9 to govern transport of Tank 24 to the Port of Miami.

Clause 1 of the bill of lading, the paramount clause, provided that the bill of lading was subject to and incorporated the provisions of COGSA. In pertinent part, clause 1 provided that:

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States of America, approved April 16, 1935, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the Carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. The provisions stated in said Act (except as may be otherwise specifically provided herein) shall govern before the goods are loaded on and after they are discharged from the ship and throughout the entire time the goods are in the custody of the Carrier. The Carrier shall not be liable in any capacity whatsoever for any delay, non-delivery, or mis-delivery, or loss of or damage to the goods occurring while the goods are not in the actual custody of the Carrier. If this bill of lading is issued in a locality where there is in force a Carriage of Goods by Sea Act or Ordinance or Statute of a similar nature to the International Convention for the Unification of Certain Rules Relating to Bills of Lading at Brussels of August 24, 1924, it is subject to the provisions stated in such Act, Ordinance and rules thereto annexed which may be in effect where this bill of lading is issued.

The bill of lading also specifically limited Kirk Line's liability for damage to $500 per customary freight unit, in accordance with 46 U.S.C. app. § 1304(5). Clause 17 provided that:

In the case of any loss or damage to or in connection with goods exceeding in actual value $500 lawful money of the United States per package, or, in case of goods not

shipped in packages per customary freight unit the value of the goods shall be deemed to be $500 per package or per unit, on which basis the freight is adjusted and the Carrier's liability, if any, shall be determined on the basis of a value of $500 per package or per customary freight unit or pro rata, in case of partial loss or damage, unless the nature of the goods and a valuation higher than $500 shall have been declared in writing by the shipper upon delivery to the Carrier and inserted in this bill of lading and extra freight paid if required and in such case if the actual value of the goods per package or per customary freight unit shall exceed such declared value, the value shall nevertheless be deemed to be the declared value and the Carrier's liability, if any, shall not exceed the declared value and any partial loss or damage shall be adjusted pro rata on the basis of such declared value.

Whenever the value of the goods is less than $500 per package or other freight unit, their value in the calculation and adjustment of claims for which the Carrier may be liable shall for the purpose of avoiding uncertainties and difficulties in fixing value be deemed to be the invoice value, plus freight and insurance if paid, irrespective of whether any other value is greater or less.

The limitation of liability and other provisions contained in the article shall inure not only to the agents, servants and employees, but also to the benefit of any independent contractors performing services including stevedoring in connection with the goods covered hereunder.

Tank 24 was shipped on a lump sum freight basis and is a customary freight unit under COGSA. Hiram Walker, 877 F.2d at 1516.

On March 26, 1985, the M/V Morant Bay set sail for the Port of Miami. It arrived March 29, 1985, after which Eller's longshoremen unloaded Tank 24 from the vessel onto the pier at the Port of Miami and stored it on Eller's lot number 4. On April 1, 1985, a driver for Indian River

arrived to receive the cargo on behalf of Hiram Walker. Eller made Tank 24 available to the Indian River driver, so that he could connect a hose to Tank 24 and pump the Tia Maria from the tank into his trailer. At this point, the Indian River driver realized that he lacked the proper connections for the pump and requested that Eller perform a gravity feed of the liqueur.

The gravity feed is described in this court's findings of fact and conclusions of law entered February 1, 1988, and in the Eleventh Circuit decision. In summary, the gravity feed involved using a forklift to lift Tank 24 to a position higher than the trailer, so that gravity would force the liqueur through a hose and into the trailer. While the gravity feed was being performed, Tank 24 fell from the blades of the forklift, and most of its contents spilled. The remaining liqueur was contaminated by anti-explosive foam during cleanup operations.

According to an oral agreement between Hiram Walker and Indian River, Indian River was responsible for pumping the Tia Maria cargo into its trailer. Transcript of Trial Dec.4, 1989, at 21-22.

Hiram Walker had no agreement with Indian River regarding how the liqueur should be transferred if it were not pumped. Id. Hiram Walker's agreement with Kirk Line is contained in bill of lading number 9, which contains no provision regarding the method for transferring the liqueur from Tank 24 to the Indian River trailer.

The bill of lading does not define delivery, but it makes various references to delivery. Clause 12 provides that "the goods shall be considered to be delivered and at their own risk and expense in every respect when taken into the custody of customs or other authorities." Clause 15 provides that the carrier has a lien on "the goods, which shall survive delivery" for all charges due under the bill of lading. Clause 18 provides that "removal of the goods into the custody of the person entitled to delivery thereof under the contract of

carriage . . . shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading."

Customs authorities never took custody of the goods, so the type of delivery contemplated in Clause 12 never occurred.

Before the accident, an Eller employee issued a delivery receipt to the Indian River driver, stating that "the cargo was "pumped out of Tank 24 (as per manifest)." Plaintiff's Exhibit No. 11. No gate pass was issued. Transcript of Trial Dec. 4, 1989, at 90.

Although the bill of lading includes no provisions regarding transfer of the cargo, Kirk Line expected Eller to provide to the shipper whatever services were necessary to effect a physical transfer of the cargo. Plaintiff's Exhibit No. 56 at 57. While Eller was not obligated to accommodate a gravity transfer, it was obligated to ensure that the cargo was transferred. Transcript of Trial Dec. 4, 1989, at 86. Eller performed gravity transfers in approximately a third of all deliveries, most commonly by using an elevated ramp. Id. at 103. Before the accident on April 1, 1985, Eller also had performed gravity transfers with a forklift at least fifteen times. Deposition of Daniel Wright at 24 (Oct. 1, 1986). While the agreement between Eller and Kirk Line was oral, Eller's vice president negotiated with Kirk Line for clauses to be included in the bill of lading that would extend to Eller the COGSA liability limitation. Transcript of Trial Dec. 4, 1989, at 82-83. Clause 17 extends the liability limitation to Kirk Line's agents, servants and employees, and to "independent contractors performing services including stevedoring in connection with the goods covered hereunder." The same third parties are included in what is

known as a Himalaya clause,[2] clause 29 of the bill of lading entitled "Exemptions and immunities of all servants and agents of the Carrier":

It is hereby expressly agreed that no servant or agent of the Carrier (including every independent contractor from time to time employed by the Carrier) shall in any circumstances whatsoever be under any liability whatsoever to the Shipper, Consignee or Owner of the goods or to any Holder of this Bill of Lading for any loss, damage or delay of whatsoever kind arising or resulting directly or indirectly from any act, neglect or default on his part while acting in the course of or in connection with his employment and, but without prejudice to the generality of the foregoing provisions in this Clause, every exemption, limitation, condition and liberty herein contained and every right, exemption from liability, defence [sic] and immunity of whatsoever nature applicable to the Carrier or to which the Carrier is entitled hereunder shall also be available and shall extend to protect every such servant or agent of the Carrier acting as aforesaid and for the purpose of all the foregoing provisions of this Clause the Carrier is or shall be deemed to be acting as agent or trustee on behalf of and for the benefit of all persons who are or might be his servants or agents from time to time (including independent contractors as aforesaid) and all such persons shall to this extent be or be deemed to be parties to the contract in or evidenced by this Bill of Lading.

C. CONCLUSIONS OF LAW

This action is governed by the terms of the bill of

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[2] Himalaya clauses are named after the vessel in an English case. For an explanation, see Brown & Root, Inc. v M/V Peisander, 648 F.2d 415, 417 n.5 (5th Cir. 1981).

lading issued for Tank 24 and the provisions of COGSA. By its terms, COGSA applies to a carrier only "in relation to the loading, handling, stowage, carriage, custody, care and discharge" of goods. 46 U.S.C. app. § 1302; Philip Morris v. American Shipping Co., Inc., 748 F.2d 563, 566 (11th Cir. 1984). Regarding the time periods not governed by COGSA--that is, the time before the cargo is loaded on the vessel and the time from discharge until delivery--the Harter Act normally applies. Harter Act, ch. 105, § 1, 27 Stat. 445 (1893) (codified as amended 46 U.S.C. app. §§ 190-195 (1982 and Supp. V 1987)).

Nevertheless, the parties contractually may agree that COGSA applies to the entire period of time in which the carrier has custody of the cargo. Philip Morris, 748 F.2d at 566. The parties may agree to incorporate COGSA in a bill of lading in whole or in part. Ralston Purina Co. v. Barge Juneau and Gulf Caribbean Marine Lines Inc., 619 F.2d 374, 375-76 (5th Cir. 1980) (where COGSA incorporated but bill of lading provided different statute of limitations, limitations period in bill of lading and not COGSA would govern). Thus, by agreement the parties can extend the COGSA $500-per-package liability limitation to the period after discharge and before delivery. Cf. Baker Oil Tools Inc. v. Delta S.S. Lines Inc., 562 F.2d 938, 940 n.3 (5th Cir. 1977) (parties may agree to extend COGSA package limitation to period before loading when in carrier's possession), modified and reh'g denied, 571 F.2d 978 (5th Cir. 1978), 577 F.2d 1134 (5th Cir. 1978).

In this case, the parties included a clause paramount in bill of lading number 9 that made COGSA in its entirety applicable to the time period "after [the cargo is] discharged from the ship and throughout the entire time the goods are in the custody of the Carrier." This clause paramount makes COGSA applicable to a time period in which it would not normally apply, deems COGSA to be incorporated in the bill of lading, and ensures that nothing in the bill of lading shall

increase the carrier's liability beyond the $500 per package limitation of section 1304(5). Brown & Root, Inc. v. M/V Peisander, 648 F.2d 415, 420 (5th Cir. 1981); see also Insurance Co. of North America v. M/V Ocean Lynx, 901 F.2d 934, 939 (11th Cir. 1990) (clause paramount and fair opportunity to declare higher value for cargo two preconditions to invoking COGSA liability limitation). Under the clause paramount, Kirk Line's liability to Hiram Walker is limited to $500 per package during the entire time period that Kirk Line had custody of Tank 24.

On its face, the COGSA package limitation incorporated in the clause paramount applies only to carriers and ships.[3] Stevedores, terminal operators, freight handlers, and the carrier's agents are not protected automatically by the COGSA liability limitation. Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S . 297 , 79 S. Ct. 766, 3 L.Ed.2d 820 (1959); Generali v. D'Amico, 766 F.2d 485,

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[3] Section 1304(5) provides that:

Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: Provided, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

487 (11th cir. 1985). Notwithstanding, it is well settled that parties to a bill of lading may contractually extend a liability limitation to non-carriers or the carrier's agents, if the intent to make third parties beneficiaries of the liability limitation is expressed clearly and unambiguously. Generali, 766 F.2d at 487.

Language in bill of lading number 9 that extended the liability limitation to stevedores and "independent contractors" is sufficiently clear to extend the limitation to Eller, in its capacity both as a stevedore and as a terminal operator. Certain Underwriters at Lloyds' v. Barber Blue Sea Line, 675 F.2d 266, 270 (11th Cir. 1982) (when bill of lading extended protection to "independent contractor," company acting as stevedore and terminal operator protected by COGSA when cargo lost at Port of Miami), cited in 2A A. Jenner, E. Flynn, G. Raduazzo, Benedict on Admiralty §169 n.17 (6th ed. 1990) (courts generally hold that phrase "independent contractors" sufficiently clear to include stevedores and terminal operators); cf. Generali v. D'Amico, 766 F.2d 485, 490 (11th Cir. 1985) ("clarity of language" requirement does not mean only parties specifically enumerated in bill of lading entitled to COGSA liability limitation).

When functioning as either a stevedore or as a terminal operator, Eller was acting as an independent contractor and not as Kirk Line's agent, because Eller was not subject to Kirk Line's general supervision and control while performing its contractual duties. Koppers Co., Inc. v. S/S Defiance, 542 F. Supp. 1356, 1361 and n.7 (D. Md. 1982), aff'd, 704 F.2d 1309 (4th Cir. 1983). The accident occurred after Tank 24 was stored on Eller's lot number 4 and at a point of rest. See 46 C.F.R. § 515.4(c) (1989) (defining point of rest as area on terminal facility assigned for receipt of inbound cargo and from which cargo may be delivered to consignee). Thus, it occurred after the stevedoring portion of Eller's services had concluded.

Accordingly, if Eller acted as an independent contractor of Kirk Line in performing the gravity transfer, it did so as a terminal operator.

Determination of whether Eller was acting in its capacity as Kirk Line's terminal operator at the time of the accident involves consideration of whether Eller was "perform[ing] the functions and duties of the carrier within the scope of the carriage contract." Certain Underwriters at Lloyds', 675 F.2d at 270. A written memorandum of the contract of carriage is included in the bill of lading. G. Gilmore & C. Black, The Law of Admiralty 93 (2d ed. 1975). The terms of the bill of lading made Kirk Line responsible until the goods were delivered, as long as the cargo remained in its custody. Whether that responsibility still existed when the accident occurred, and whether Eller can benefit from the COGSA package limitation, depends on the meaning of the terms delivery and custody.

For proper delivery to occur, general maritime law requires only that a carrier "unload the cargo onto a dock, segregate it by bill of lading and count, put it in a place of rest so that it is accessible to the consignee, and afford the consignee a reasonable opportunity to come and get it." F.J. Walker Ltd. v. M/V "Lemoncore", 561 F.2d 1138; 1142 (5th Cir. 1977) (quoting American President Lines, Ltd. v. Federal Maritime Board, 317 F.2d 887, 888 (D.C. Cir. 1962)). Although most cases thus defining delivery have been decided under the Harter Act, it has been held that such delivery relieves the carrier of his responsibility under both COGSA and the Harter Act. Crisis Transportation Co. v. M/V Erlanger Exp., 794 F.2d 185, 188 (5th Cir. 1986) (citing Allstate Ins. Co. v. Imparca Lines, 646 F.2d 166 (5th Cir. 1981); F.J. Walker., Ltd., 561 F.2d 1138)). Furthermore, it is reasonable to apply interpretations of the term "delivery" under the Harter Act to delivery of goods when the parties have incorporated COGSA by agreement. G. Gilmore & C. Black, The Law of Admiralty 148-49 (2d

ed. 1975).

Notwithstanding this general rule of delivery, the requirements for delivery may be modified by custom, regulation, or the law of the port. Philip Morris, 748 F.2d at 566-67; Allstate Ins. Co., 646 F.2d at 168 (while neither bill of lading nor Harter Act defined proper delivery, delivery in most general sense "requires discharge of the cargo upon a fit and customary wharf . . . according to the custom and usage of the port"). The required type of delivery also may be modified by contract, as when the bill of lading bears designations like "pier to pier" or "house to house." See Austracan (U.S.A.), Inc. v. Neptune Orient Lines, Ltd., 612 F. Supp. 578, 584-85 (S.D.N.Y. 1985) (discussing various such designations and their trade meanings).

In this case, the bill of lading is imprecise as to when the carrier's responsibility ended, merely indicating that this responsibility ended when the cargo was delivered and custody was relinquished. The bill of lading does not define either delivery or custody. It provides in clause 18, however, that "removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage . . shall be prima facie evidence of the delivery by the Carrier of the goods as described in the bill of lading."

Considering this language, the court concludes that delivery did not occur before the accident, because Indian River had not removed the Tia Maria from Tank 24 into its custody. By linking delivery to custody, the parties agreed that actual delivery of the cargo would be required before Kirk Line's responsibilities ended. Actual delivery required that Eller "completely transfer[] the possession and control of goods from the vessel to the consignee or his agent." B. Elliott (Canada) Ltd. v. John T. Clark & Son of Maryland, Inc., 704 F.2d 1305, 1308 (4th Cir. 1983) (distinguishing between constructive delivery, akin to general definition of delivery, and actual delivery); see also A/S

Dampskibsselskabet Torm v. McDermott, Inc., 788 F.2d 1103, 1109 (5th Cir. 1986) (if no particular custom at point of discharge, "goods are delivered when they are so completely in the custody of the consignee that he may do as he pleases with them"). The mere fact that a delivery receipt issued does not persuade the court that actual delivery occurred.

Although Eller made Tank 24 available to Indian River for pumping, custody of the cargo did not change because possession and control would not have transferred to Indian River until the gravity feed was complete. Hiram Walker has conceded that had Eller asked the Indian River driver to return with proper pumping equipment, custody of the cargo would have remained with Eller until the Indian River driver returned. Transcript of Trial Dec. 4, 1989, at 26. The fact that Eller once made Tank 24 available to Indian River would not have prevented Eller from being liable if the tank were lost or damaged while the driver was procuring the equipment. See Certain Underwriters at Lloyds', 675 F.2d at 268 (terminal operator and freight handler liable for 14 cargo cartons lost at Port of Miami, although liability limited to $500 per carton); see also English Electric Valco, Ltd. v. M/V Hoegh Mallard, 814 F.2d 84, 88 (2nd Cir. 1987) (shipping company retained custody of goods until trucker picked up container, although liability for water damage limited to $500 under COGSA); Thyssen v. M/V Med Transporter, 1989 Am. Maritime Cas. 1515, 1516 (N.D. Ohio 1989) (stevedore responsible for loss occurring before delivery to consignee or for damage while in stevedore's custody); E.M. Chemicals v. S/S Sloman Najade, 670 F. Supp. 87, 89 (S.D.N.Y. 1987) (when goods lost while in custody of terminal operator, neither actual nor constructive delivery occurred). Eller's responsibility continued until the empty Tank 24 was returned to the vessel. Transcript of Trial Dec. 4, 1989, at 123.

Having considered the meaning of delivery and custody within the scope of the parties' agreement, the court concludes that Eller was attempting to make delivery and transfer custody of the cargo when the accident occurred. Thus, Kirk Line's responsibility under the bill of lading had not ended when Tank 24 fell from the forklift. See Generali, 766 F.2d at 487 (COGSA protected terminal operator that loaded cargo onto consignee's truck, at which point package fell and was damaged; operator stored cargo for 18 days "at which time the consignee arrived to take delivery").

The fact that Indian River was obligated to Hiram Walker to pump the liqueur did not relieve Kirk Line of its responsibility under the bill of lading to deliver the cargo into Indian River's custody nor did it relieve Eller of its responsibility to perform certain services as Kirk Line's independent contractor. Just as Eller was performing Kirk Line's functions and duties under the carriage contract by delivering the cargo and ensuring a complete transfer of custody, Eller's actions in performing the gravity feed were within the scope of the independent contracting services contemplated by its oral agreement with Kirk Line, which were governed by the bill of lading.

The bill of lading extended COGSA's liability limitation to "any independent contractors performing services including stevedoring in connection with the goods covered hereunder." Although Kirk Line may not have contemplated specifically that Eller would perform gravity feeds, agents of both Kirk Line and Eller testified that Kirk Line expected Eller to perform whatever terminal services were necessary to accommodate the shippers and inland carriers.[4] The court considers this testimony credible.

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[4] To determine whether the gravity transfer was a service that Kirk Line and Eller contemplated as being connected to the goods and governed by the bill of lading, the court considers evidence extrinsic to

In summary, Eller's act in performing the gravity transfer occurred before Kirk Line's responsibility under the bill of lading ended, because custody of the cargo remained with Kirk Line and delivery had not occurred. Furthermore, Eller's act was within the scope of its employment by Kirk Line as an independent contractor. Thus, Eller's liability is capped by clauses 17 and 29 of Kirk Line's bill of lading. Eller is entitled to limit its liability for damages to Tank 24 to $500, as the tank is a customary freight unit. Hiram Walker, 877 F.2d at 1516.

Judgment will be entered in accordance with these findings and conclusions as provided by Rule 52, pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE and ORDERED at the United States District Court, Miami, Florida, this 6 day of August, 1990.

Kenneth L. Ryskamp
United States District Judge

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the bill of lading, which does not define the scope of such services. See Koppers Co. Inc., 542 F. Supp. at 1356 (court may consider extrinsic evidence to establish whether stevedore and/or terminal operator acting as carrier's agent).

Appendix F

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellee,
v.
KIRK LINE, et al., Defendants,

Indian River Transport, Inc.,
Defendant-Appellant.

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellee,
v.
KIRK LINE, et al., Defendants,

Eller & Company, Inc.,
Defendant-Appellant,

Indian River Transport, Inc.,
Defendant-Appellee.

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellee,
v.
KIRK LINE, RB. Kirkconnell & Bro.
Ltd., et al., Defendants,

Indian River Transport, Inc.,
Defendant-Appellant.

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellee,
Cross-Appellant,
v

KIRK LINE, R.B. Kirkconnell & Bro.,

Ltd., Jamaica Merchant Marine Atlantic Line Ltd., Indian River Transport, Inc.,
SS MORANT BAY, its engines, boilers, etc.,
Defendants,

Eller & Company, Inc., Indian River Transport, Inc., Defendants Appellants, Cross-Appellees.

Nos. 87 5048, 87-5094, 87-5111 and 88-5180.

United States Court of Appeals,
Eleventh Circuit.
July 21, 1989.

The owner of liqueur which was spilled while being transferred from tanks into a common carrier's freight trailer sued common carrier and a stevedore. The United States District Court for the Southern District of Florida, No. 86-762-CIV-KLR, Kenneth L. Ryskamp, J., entered summary judgment for owner, and defendants appealed. The Court of Appeals, Kravitch, Circuit Judge, held that (1) the district court had subject matter jurisdiction over both defendants; (2) issues of material fact existed as to whether the negligence of the common carrier was superseded by the conduct of the stevedore; and (3) issues of material fact existed as to whether stevedore was entitled to the protection of a "Himalaya" clause in the bill of lading.

Reversed and remanded.

(Keynotes not reproduced)

Appeals from the United States District Court for the

Southern District of Florida.
Before KRAVITCH and HATCHETT, Circuit Judges, and MARKEY, Chief Circuit Judge.

KRAVITCH, Circuit Judge:

The plaintiff Hiram Walker & Sons, Inc. *(Footnote 1)* (Hiram Walker), filed this action in the Southern District of New York against defendants Indian River Transport, Inc. (Indian River), Eller & Company, Inc. (Eller), R.B. Kirkconnell & Bro., Ltd. (Kirk Line), and Jamaica Merchant Marine Atlantic Line, Ltd. (Jamaica Line), seeking damages for the loss of several thousand gallons of the liqueur Tia Maria. Upon Eller's motion, the case was subsequently transferred to the Southern District of Florida. After all parties moved for summary judgment, the district court dismissed Kirk Line and Jamaica Line from the action, and granted Hiram Walker's motion against Eller and Indian River on the question of liability. Indian River and Eller each filed an interlocutory appeal in this court, but because of a jurisdictional problem those appeals were never decided on the merits. The district court subsequently held a bench trial to determine the amount of damages due Hiram Walker. Following the trial, the district court quantified Hiram Walker's damages, for which it adjudged Eller and Indian River each fifty percent liable. Eller and Indian River appealed; Hiram Walker cross-appealed against those two defendants but did not appeal the district court's dismissal of the actions against Kirk Line and Jamaica Line. We consolidated all appeals from the earlier summary judgment order and the order following trial; we now reverse and remand.

I. BACKGROUND

Hiram Walker purchased five thousand gallons of Tia Maria from Estate Industries in Jamaica on March 15, 1986.

On March 26, a twenty-three ton tank containing the liqueur as loaded aboard the M/V *Morant Bay* in Kingston, apparently in good order. Kirk Line had chartered the Morant Bay from its proprietor, Jamaica Line, for a shipment of cargo including Hiram Walker's liqueur, which was shipped under a Kirk Line-Hiram Walker bill of lading. The tank arrived in Miami three days later. Kirk Line hired Eller, a stevedore, to unload the tank from the *Morant Bay* and store it at the dock.

Hiram Walker contracted with Indian River to transport the liqueur overland to New Jersey; Hiram Walker and Indian River agreed that Indian River was to pump the liqueur from the tank into its freight trailer. On April 1, Jones, an employee of Indian River, arrived at the port to effect the pumping transfer. An Eller employee removed the tank from storage and aligned it with the trailer. Jones attempted to connect the tank and the trailer, but realized that a fitting needed to connect the hoses was missing. Even though another fitting on the back of the tank might have been used to pump the liqueur into the trailer, Jones decided that pumping the liqueur would be impossible; therefore, he asked Marshall, an Eller employee, to help him accomplish a "gravity feed"--essentially, Jones wanted to pour the liqueur from the tank to the trailer. To effect a gravity feed, the tank had to be elevated higher than the trailer. Marshall directed another Eller employee, Wright, to assist Jones. Wright lifted the tank on a large forklift; Wright, however, was not licensed to operate forklifts of this capacity.

Wright and Marshall neglected to put straw mats or other dunnage between the metal forks and the metal container. Fifteen minutes into the operation, the tank apparently began to slide off the forks because of the lack of dunnage. Deciding that the tank was not properly balanced, Marshall instructed Wright to find another forklift. Wright did not lower the tank, but left the forklift holding the tank suspended eight feet off the ground for ten minutes; leaving

a load suspended was a violation of standard company procedure. As Wright returned, the tank fell off the forklift. The tank ruptured, and eighty-five percent of the Tia Maria in the tank spilled out. The liqueur remaining in the tank was contaminated during the clean-up, in which several fire-engine companies covered the area with anti-explosive foam.

II. BASIS OF FEDERAL JURISDICTION

The claim against Indian River was pleaded as a federal question; and against Eller, in diversity. The district court analyzed the cases against Eller and Indian River under maritime tort law; because the accident in question did not occur at a maritime situs, however, admiralty jurisdiction would not support the claims against these two defendants. *Harville v. Johns-Manville Products Corp.*, 731 F.2d 775, 782 (11th Cir.1984); *Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir.1980). *(Footnote 2)* On appeal, Indian River argues that the district court lacked subject-matter jurisdiction over the claim asserted against it. We of course may consider the question of Article III subject-matter jurisdiction for the first time on appeal; additionally, an explanation of the basis of federal jurisdiction over each defendant will point out the source of law applicable to each claim.

A. *Federal subject-matter jurisdiction*

[1] Hiram Walker urges that its claim against Indian River arises under the Carmack Amendment, 48 U.S.C. 11707, which provides in relevant part:

> A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission ... shall issue a receipt or bill of lading for

property it receives for transportation under this subtitle. That carrier . . . [is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (1) the receiving carrier.... Failure to issue a receipt or bill of lading does not affect the liability of a carrier....

49 U.S.C.A. § 11707(a)(1) (1988). In its complaint, Hiram Walker alleged that Indian River "totally breached, failed and violated its duties as an interstate common carrier in receiving, tending, caring for and delivering the [shipment of Tia Maria] in good condition, but on the contract, so seriously [damaged] the same while in its possession that it "as rendered a total loss." Section 1337 of Title 28 imposes an amount-in-controversy requirement over suits brought under the Carmack Amendment; that requirement is satisfied by the allegations in the complaint. The complaint sufficiently pleaded a federal claim against Indian River. *(Footnote 3)*

Because the Carmack Amendment would not support the claim against Eller, Hiram Walker alleged that this claim was properly within the court's diversity jurisdiction. 28 U.S.C. 1332. In the complaint, Hiram Walker conspicuously failed to allege that it and Indian River were of diverse citizenship. Diversity jurisdiction ordinarily is not available "when any plaintiff is a citizen of the same State as any defendant." *Owen Equipment & Erection Co. v Kroger*, 437 U.S. 365, 374, 98 S.Ct. 2396, 2403, 57 L.Ed.2d 274 (1978). An exception to the general rule exists, however, when the plaintiff joins a non-diverse defendant sued under federal law with a diverse defendant sued in diversity. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 381, 79 S.Ct. 468, 485, 3 L.Ed.2d 368 (1959) ("Since the Jones Act provides an independent basis of federal jurisdiction over the non-diverse respondent, ... the rule of *Strawbridge v. Curtiss*, 3 Cranch 267, 2 L.Ed. 435, does not require

dismissal of the claims against the diverse respondents."); *Kauth v. Hartford Ins. Co.*, 852 F.2d 951, 958-59 (7th Cir.1988); *Baker v. J.C. Penney Co.*, 496 F.Supp. 922 (N.D.Ga.1980). In *Baker*, Judge Vining observed that an anomaly would be created by "not allowing a plaintiff to do in one federal suit what he would be entitled to do in two separate federal suits." 496 F.Supp. at 924.

[2] Alternatively, the claim against Eller was properly within the pendent-party jurisdiction of the district court. We recently held that district courts have the power to hear the state claim against the second party if (1) the federal claim against the first party is substantial, meaning not "inescapably" frivolous, *Jackson v. Stinchcomb*, 635 F.2d 462, 471 (5th Cir.1981), (2) the statute conferring jurisdiction over the federal claim does not "expressly or by implication negate[ ]" the existence of pendent jurisdiction, *Aldinger v. Howard*, 427 U.S. 1, 18, 96 S.Ct. 2413, 2422, 49 L.Ed.2d 276 (1976), and (3) the state claim arises out of a "common nucleus of operative fact," such that the plaintiff would be expected to try the federal and state claims together. [*United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966)]. *Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1570 (11th Cir.1988) (emphasis in original). Here, the federal claim is substantial and the claims against Eller and Indian River, as joint tortfeasors, arise out of a "common nucleus of operative fact." With regard to the second prong, even though claims under the Carmack Amendment may be brought in state court, 49 U.S.C. §11707(d)(1), Congress has neither expressly nor impliedly foreclosed the possibility of pendent-party jurisdiction under the Carmack Amendment. *Boudreaux v. Puckett*, 611 F.2d 1028,1031 (5th Cir.1980) (no negation of pendent-party jurisdiction under 15 U.S.C. 1981 even though such claims may be brought in State court); compare Aldinger, 427 U.S. at 19, 96 S.Ct. at 2422 (Congress impliedly negated pendent-party jurisdiction over

counties in suits predicated on 28 U.S.C. §1343 (3), which provides jurisdiction for suits brought under 42 U.S.C. § 1983, because counties were not "persons" covered by 1983 under the then extant construction) *with Giardiello*, 837 F.2d at 1571 (no negation of pendent-party jurisdiction under ERISA); *First Alabama Bank v. Parsons Steel, Inc.*, 747 F.2d 1367, 1377 (11th Cir. 1984) (no negation of pendent-party jurisdiction under Bank Holding Company Act), *rev'd on other grounds*, 474 U.S. 518, 106 S.Ct. 768, 88 L.Ed.2d 877 (1986); and *Lykins v. Pointer Inc.*, 725 F.2d 645, 647 (11th Cir.1984) (no negation of pendent-party jurisdiction under 28 U.S.C. § 1346(b)).

B. Source of the rule of law

[3] For Indian River, federal law governs the determination of liability and the measure of damages under the Carmack Amendment, and common-law principles give content to the federal rule. *Hector A. Martinez & Co. v. Southern Pacific Transportation Co.*, 606 F.2d 106, 108 n. 1 (5th Cir.1979), *cert. denied*, 446 U.S. 982, 100 S.Ct. 2962, 64 L.Ed.2d 838 (1980); *Dublin Co. v. Ryder Truck Lines, Inc.*, 417 F.2d 777, 778 (5th Cir.1969).

Analysis of the source of law for the claim against Eller is a bit more complicated. This action originally was filed in the Southern District of New York, and Eller moved that court, pursuant to 28 U.S.C. § 1404(a), to transfer the case to the Southern District of Florida. The Florida federal court, therefore, must apply the rule that would have been applied by the transferor New York federal court. *Van Dusen v. Barrack*, 376 U.S. 612, 639, 84 S.Ct 805, 821, 11 L.Ed.2d 945 (1964). The New York federal court would have applied the New York choice-of-law rule in determining whether to apply Florida tort law or New York tort law to this claim. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020,1021, 85 L.Ed. 1477

(1941).

Over twenty-five years ago the New York Court of Appeals abandoned the strict *lex loci delicti* rule in favor of interest analysis for choice-of-law in torts cases. *Babcock v. Jackson*, 12 N.Y.2d 473, 191 N.E.2d 279, 240 N.Y.S.2d 743 (1963). Interest analysis would in any event lead a New York court to apply Florida law in judging Eller's conduct, even were Florida law inconsistent with the law in New York. See *Schultz v. Boy Scouts of America, Inc.*, 65 N.Y.2d 189, 480 N.E.2d 679, 491 N.Y.S.2d 90 (1985) ("when the conflicting rules involve the appropriate standards of conduct, rules of the road, for example, the law of the place of the tort will usually have a predominant, if not exclusive concern'"); *Hacohen v. Bolliger Ltd*, 108 A.D.2d 357, 489 N.Y.S.2d 75 (1985) (where defendant's standard of conduct is judged, court should look to the place of the tort in order to give effect to that jurisdiction's interest in regulating conduct within its borders). Eller's conduct is therefore to be measured under Florida law.

III. LIABILITY OF INDIAN RIVER AND ELLER

A. *Indian River*

[4] We review the disposition of a motion for summary judgment de novo, applying the same standards that should have been applied by the district court *Eastern Air Lines v. Air Line Pilots Assoc. Int'l*, 861 F.2d 1546, 1549 (11th Cir.1988). The district court drew the following inferences from the papers the parties submitted in support of their cross-motions for summary judgment:

A gravity feed, unlike a pumping transfer, required that the tank containing the liqueur be elevated to a height sufficient to allow sheer gravitational force to impel the liqueur in the tank to drain downward to the [Indian River]

trailer. This operation, of course, was intrinsically and conspicuously fraught with dangers which would not have been present in a pumping transfer. It therefore seems plain that had Jones brought a cam-lock, the instrumentality needed to perform the transfer of the liqueur properly, the accident resulting in [Hiram Walker's] tank of liqueur being dropped and spilled, would never have occurred.

On the basis of these observations, the district court adjudged Indian River liable for the damage to the Tia Maria. The trial court disregarded contradictory evidence and plainly drew inferences against Indian River, the non-movant. In the procedural posture of this case, the district court's exercise of its fact-finding powers constituted reversible error. *(Footnote 4)*

The claim against Indian River appears to based on both a theory of tort and a theory of contract. Indian River behaved negligently in failing to bring the required fitting and then requesting a gravity transfer; alternatively, Indian River breached an express term of its contract with Hiram Walker by failing to perform a pump transfer. At least two questions are presented under a theory of tort that were not susceptible of resolution against Indian River on a motion for summary judgment. First, drawing inferences in favor of the non movant, the district court should have concluded that it was "highly extraordinary" that Indian River's failure to bring the proper fitting "should have brought about the harm." Restatement (Second) of Torts §435(2). The court may yet draw that conclusion after a full airing of the facts at trial, a conclusion that would absolve Indian River of liability for the lost liqueur.

Second, Indian River has demonstrated a very substantial question whether Eller's behavior should be considered a superseding cause of the accident, another finding that would preclude Indian River's liability. Restatement (Second) of Torts §§ 440 453. It is beyond dispute that Eller's conduct "actively operate[d] in producing

harm to [Hiram Walker] after [Indian River's] negligent act or omission ha[d] been committed." Restatement (Second) of Torts § 441(1). Eller's conduct was thus an "intervening force" causing the spill; again drawing all inferences in favor of Indian River, the court should have determined that the intervening force as a superseding cause. Among other considerations, Eller's negligence brought about "harm different in kind from that which would otherwise have resulted from [Indian River'] negligence; "Eller's negligence was not "a normal result" of Indian River's negligence; the intervening force was due to Eller's action; and "the intervening force [was] due to an act of [Eller] which [was] wrongful toward [Hiram Walker] and as such subject[ed] [Eller] to liability." *(Footnote 5)* See Restatement (Second) of Torts § 442. Evidence before the district court established the foregoing for summary judgment purposes; the court had before it proof that gravity transfers are common and usual, and that Eller had previously performed gravity feeds for Indian River's drivers who had arrived without the proper pumping equipment. *(Footnote 6)*

As a matter of law, Indian River's conduct in ordering a gravity feed cannot be characterized as negligent on the basis of the facts before the district court. The district court had before it no evidence tending to show that gravity feeds are inherently and unreasonably dangerous; to the contrary, the court was presented with evidence that dockworkers often perform gravity feeds. *(Footnote 7)* It may be that gravity feeds are more difficult than pump transfers, but that alone would not render one who requests a gravity feed liable for any damage that arises from a botched execution. We are presented with no substantial evidence that a competently executed gravity feed is an unreasonable solution to the problem of transferring a liquid from one tank to another; indeed, a gravity feed may under some circumstances be more efficient than pumping transfers. We cannot write a rule of law which would prevent prudent

persons from requesting gravity feeds. *(Footnote 8)*

[5] Nor was summary judgment against Indian River proper under a theory of contract. Assuming Indian River did breach its contract with Hiram Walker, it would be liable only for those damages which it had "reason to foresee as a probable result of the breach When the contract as made." Restatement (Second) of Contracts § 351(1); see *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng.Rep. 145 (1854). We certainly cannot say as a matter of law that Indian River had "reason to foresee" that its failure to perform a pump transfer and its request that Eller undertake a gravity feed would result in the loss of nearly all of the Tia Maria. Whether framed as a tort or a breach of contract, summary judgment should not have been entered against Indian River on the question of liability.

B. *Eller*

[6] We agree that the undisputed facts surrounding the loss of the Tia Maria established Eller's negligence as a matter of Florida law. See *Russ v. State*, 140 Fla. 217, 191 So. 296 (1939); *Seaboard Coast Line R.R. Co. v. Griffis*, 381 So.2d 1063, 1065 (Fla.App.) ("Negligence is the failure to observe, for the protection of another's interest, such care and precaution as the circumstances demand, or the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances."), *cert. denied*, 376 So.2d 72 (Fla.1979); *Stirling v. Sapp*, 229 So.2d 850, 853 (Fla.1969) ("Where the facts are undisputed and the evidence is reasonably susceptible of but a single inference, the question of defendant's negligence ... becomes one of law for the court."). An Eller employee not licensed to operate the particular forklift raised the twenty-three ton tank containing Tia Maria without placing dunnage between the tank and the blades of the forklift. When his supervisor noticed that the tank was slipping, the employee left the tank suspended

above the ground for several minutes while searching for another forklift. The tank fell and ruptured; the Tia Maria was lost to the happy wharf rats. Hiram Walker satisfied its burden of producing enough undisputed evidence to make out a prima facie case for negligence under the *Russ* standard. The burden shifted to Eller to show that, notwithstanding these facts, its employees' behavior was reasonable under the circumstances. Eller argues that the trial court incorrectly presumed that the Eller forklift operator should have complied with standard operating procedures and "lowered the tank when the tilt was first noticed to save the day." Eller, who had the burden of showing that this direct inference from the undisputed facts was at least questionable, points to no proffer that calls the inference into doubt. Even assuming that the tank could not have been lowered, Eller does not proffer evidence suggesting why it should not be held negligent for allowing an unlicensed forklift operator to lift the tank without proper dunnage. Accordingly, Eller has raised only a "metaphysical doubt" as to the material facts and its claim must fail. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct 1348, 1356, 89 L.Ed.2d 538 (1986) (when moving party has satisfied its burden, non-movant must come forward with "specific facts showing that there is a *genuine issue for trial* " (quoting Fed.R.Civ.P. 56(c)) (emphasis in original)).

[7] Hiram Walker and Eller also join issue on the effect of a "Himalaya" *(Footnote 9)* clause in Kirk Line's bill of lading, which provides that the "limitation of liability [in the Carriage of Goods by Sea Act (COGSA)] shall inure . . . to the benefit of any independent contractors performing services hereunder including stevedoring in connection with the goods covered hereunder." COGSA limits liability to $500 for damage to the tank, a "customary freight unit." E.g., *Caterpillar Americas Co. v. S.S. Sea Roads*, 231 F.Supp. 647 (S.D.Fla.1964), *aff'd*, 364 F.2d 829 (5th Cir.1966). Kirk Line hired Eller, a stevedore, to complete its

delivery obligation; Eller was an independent contractor. On summary judgment, however, the trial court concluded as a matter of law that "Eller was a volunteer and acted only when [Indian River] failed to provide the necessary equipment for the pumping operation." Accordingly, the court found that Eller was not acting within the scope of its stevedoring responsibilities to Kirk Line, and was not entitled to the limitation-of-liability provision of COGSA. We renew this determination de novo, applying the law of COGSA which the parties to the bill of lading made applicable beyond the Act's legal scope. *Assicurazioni Generali v. D'Amico*, 766 F.2d 485, 488 (11th Cir.1985); *Triple E Development Co. v. Floridagold Citrus Corp.*, 51 So.2d 435, 438 (Fla.1951) (intent of parties governs construction of contract).

Although Himalaya clauses must be "strictly construed and limited to intended beneficiaries," *Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 305, 79 S.Ct. 766, 771, 3 L.Ed.2d 820 (1959); *Certain Underwriters at Lloyds v. Barber Blue Sea Line*, 675 F.2d 266, 269 (11th Cir.1982), "[w]hen a bill of lading refers to a class of persons such as 'agents' or 'independent contractors' it is clear that the contract includes all those persons engaged by the carrier within the scope of the carriage contract." Id at 270. Kirk Line was responsible under the bill of lading for delivering the Tia Maria to Hiram Walker's agent Indian River; Eller would be an intended beneficiary of the Himalaya clause as long as Kirk Line had not completely discharged its responsibility by the time of the spill. *Assicurazioni Generali* 766 F.2d at 489. The question thus presented is whether Kirk Line's duty was fulfilled when Eller aligned the tank with Indian River's truck; if so, Kirk Line had completed its responsibilities under the bill of lading before the spill occurred, and Eller could not be said to have been an "independent contractor performing services" under the bill of lading at the time of the accident. If,

however, because of Indian River's failure to secure the proper fitting, delivery was not completed by the mere alignment of the tank with the trailer, then Kirk Line's duty of delivery would have continued and Eller would have been "an independent contractor performing services" under the bill of lading at the time of the spill, entitled to the $500 limitation. *(Footnote 10)*

Hiram Walker proffered the following evidence on this narrow question. First, it offered the deposition testimony of Eller's director of safety, in which he stated that Eller employees had performed the gravity transfer for the convenience of Indian River and agreed that "doing the gravity transfer bit was over and above the normal expected activities of Eller in transferring products." Second, this witness testified that during a pumping transfer, Eller had the duty to align the tank and the trailer, but Indian River had the duty to effect the transfer. (Another deposition witness, Eller's employee Marshall, confirmed that Indian River bore responsibility for the mechanics of a pump transfer once Eller aligned the tank and the trailer.) Finally, Hiram Walker offered the affidavit of its traffic manager, who stated that "[i]t was HIRAM WALKER's understanding with INDIAN RIVER that it was the latter's sole responsibility to transfer the bulk products from the ocean tanks to its tankers. It was not part of HIRAM WALKER's agreement with KIRK LINE that KIRK LINE would bear that responsibility."

Eller for its part proffered the affidavit of its local Miami manager, who stated that Eller's responsibility as an independent contractor for Kirk Line was to "physically move the cargo from ELLER's lot and deliver the cargo to the consignee by transferring physical possession of the cargo to the consignee." Of course, Eller's local manager is probably in a better position than its safety director to know the stevedore's responsibilities.

Neither party's proffer demonstrates as a matter of law or undisputed fact at what point discharge of Kirk Line's

responsibility under the bill of lading occurred. The affidavit of Hiram Walker's safety manager is the only direct evidence that the agreement between Hiram Walker and Kirk Line did not contemplate Kirk Line having any responsibility for the actual transfer of the Tia Maria, but this evidence has substantial weaknesses: it is a conclusory statement of an interested party and makes no reference to the actual written agreement between Kirk Line and Hiram Walker; further, it may be predicated upon the incorrect assumption that only a pump transfer would occur.

Inferences from the statements of Eller's director of safety and its Miami manager lead in opposite directions; a reasonable inference from the statement proffered by Hiram Walker is that Eller--and therefore presumably Kirk Line--had no responsibility for the actual transfer of the liquid cargo whether the transfer was effected by a gravity feed or by pumping. On the other hand, one could reasonably infer from the statement proffered by Eller that the stevedore and thus presumably Kirk Line remained responsible under the bill of lading until the last of the liquid cargo was transferred to the care of Hiram Walker's agent Indian River. Moreover, there are good reasons why a consignee such as Indian River may be responsible for a pumping transfer but not a gravity feed: the pump itself is apparently attached to the consignee's trailer, but as gravity feeds require the use of a forklift, a stevedore may have primary responsibility for that kind of operation. When a pumping transfer is effected, delivery may occur when the tank and the trailer are aligned--but it does not necessarily follow that delivery in the case of a gravity feed can finally occur before the last of the liquid is drained into the trailer; the scope of Kirk Line's duty under the bill of lading may thus depend upon the type of transfer that actually is performed. The district court should determine after trial whether Kirk Line's obligations had completely terminated by the time of the spill, but its conclusion on summary judgment was in error. *(Footnote 11)*

REVERSED and REMANDED.

Footnotes:

Honorable Howard T. Markey, Chief U.S. Circuit Judge for the Federal Circuit, sitting by designation.

1. Aetna, Hiram Walker's insurer, paid the entire loss and thus Hiram Walker no longer has an interest in the case. Under the normal rules of subrogation, Aetna was the real party in interest and should have sued in its own name. *Frank Briscoe Co v. Georgia Sprinkler Co.*, 713 F.2d 1500, 1502 n. 1 (11th Cir.1983). The district court stated that Aetna should have filed an appearance, but held that the defect did not warrant dismissal of the claim because counsel for plaintiff advised on the record that he was bringing the claim for the use and benefit of Aetna. This was a bench trial, the fact finder knew that Aetna was the real party in interest, and no defendant has shown any prejudice. The district court did not abuse its discretion by constructively joining Aetna as a party plaintiff ant refusing to dismiss the claim.

2. See *Bonner v. City of Prichard*, 661 F.2d 1206,1209 (11th Cir.1981) (in banc). The Eleventh Circuit adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981.

3. Venue may have been incorrect in the New York district court. See 49 U.S.C. § 1170,7(d)(2)(A)(iii). No party raised this objection, however, and the error was probably cured by the subsequent transfer to the Southern District of Florida.

4. Hiram Walker argues that because this case was to be tried without a jury, we should apply the clearly erroneous test of Rule 52 to the findings made by the district judge on summary judgment. Cf. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1123-25 & n. 6 (5th Cir.1978) ("If decision is to be reached by the court, and there are no issues of witness credibility, the court may conclude on the basis of the affidavits, depositions, and stipulations before it, that there are no genuine issues of material fact, even though decision may depend on inferences to be drawn from what has been incontrovertibly proved") Assuming that the pleadings incontrovertibly proved all material facts such that only inferences remained to be drawn, we would be left with a definite and firm conviction that the district court erred in holding Indian River liable. Moreover, the trial judge may have incorrectly assumed that no facts were in dispute, for the judge noted that "all the parties to this action

have moved for summary judgment, thereby clearly indicating their accord that no genuine issue of fact remains to be resolved." This is not a correct statement of the law; a movant may be correct in stating that the facts relevant to his theory of the case are not in dispute, yet contest the relevant issues of fact under his opponent's theory. *Walling v. Richmond Screw Anchor Co.*, 154 F.2d 780, 784 (2d Cir.), *cert. denied*, 328 US. 870, 66 S.Ct. 1383, 90 L Ed. 1640 (1946). For this reason we think it prudent not to accord a presumption of correctness to the district judge's fact-finding.

5. It is irrelevant that Hiram Walker may have agreed to waive a substantial portion of Eller's liability; Eller's conduct nonetheless subjected it to liability to Hiram Walker.

6. Hiram Walker quotes three Restatement (Second) of Torts provisions, arguing that they prove that Indian River's negligence in failing to bring the correct fitting was not superseded by Eller's negligence. None of these actions indicates as a matter of law that Eller's conduct is not a superseding cause:

(1) Where the negligent conduct of the actor creates or increases the foreseeable risk of harm through the intervention of another force, and is a substantial factor in causing the harm, such intervention is not a superseding cause.

Restatement (Second) of Torts § 442A. Although failing to bring the proper fitting may have increased the risk that the tank would fall (because that danger inheres in a gravity transfer), Indian River's failure to bring the proper fitting was not indisputably a substantial factor causing the tank to fall.

(2) Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability.... Restatement (Second) of Torts § 442B. Again, Indian River's failure to bring the proper fitting was not necessarily a substantial factor causing the tank to fall.

(3) The intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about.

Restatement (Second) of Torts §443. Negligent execution of a gravity feed is by no means a "normal consequence" of attempting a gravity feed.

7. The colloquy between counsel for Indian River and the safety director for Eller, proffered by Hiram Walker in an attempt to show that

gravity feeds are inherently and unreasonably dangerous, merely suggests that gravity feeds are more difficult than pumping transfers.

8. There is some confusion in the briefs concerning Indian River's liability for Eller's conduct. We do not read the district court's order of summary judgment to impose liability on Indian River under a theory of agency; the court held Indian River liable for its own acts and omissions.

9. So named after the vessel in an English case. See the exegesis in *Brown v Root, Inc. v. M/V Peisander*, 648 F.2d 415, 417 n. 5 (5th Cir.1981).

10. Indian River argues that delivery had already been completed under clause 12 of the bill of lading, which provides that delivery is complete when goods are taken "into the custody of customs or other authorities." Acknowledging that no record evidence suggests that "customs or other authorities" took possession of the liqueur, Indian River argues that "it is a more than reasonable inference that inspection had occurred within the meaning of the bill of lading prior to "Indian River's arrival. Indian River cannot base its case on a probable fact it never attempted to establish below.

11. Because we have reversed the district court's determination of liability as to both Indian River and Eller, we need not address the parties' arguments about the quantification of damages and the district court's decision not to award pre-judgment interest. When considering the question of prejudgment interest on remand, as to the claim against Eller, the district court is free to consider the effect of *Argonaut Ins Co v. May Plumbing Co*, 474 So.2d 212, 215 (Fla.1985) (prejudgment interest under Florida law--as Florida law supplies the rule for the liability claim against Eller, New York choice-of-law principles mandate that Florida law also supply the rule of decision for Hiram Walker's claim for prejudgment interest, see *Entron, Ins v. Affiliated FM Ins Co.*, 749 F.2d 127, 131 (2d Cir.1984)). As to the prejudgment interest claim against Indian River, the district court should consider the applicability of the reasoning in *George R Hall Inc v. Superior Trucking Co.*,532 F.Supp.985,996-98(N.D.Ga.1982) (Prejudgment interest under the Carmack Amendment).

Appendix G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-0762-CIV-RYSKAMP

HIRAM WALKER & SONS, INC.,
Plaintiff,

vs.

KIRK LINE, R.B. KIRKCONNELL & BRO. LTD., JAMAICA MERCHANT MARINE ATLANTIC LINE LTD., ELLER & COMPANY, INC., INDIAN RIVER TRANSPORT, INC., and the "SS MORANT BAY," its engines, boilers, etc., Defendants.

FEB 10 1988

FINAL JUDGMENT

Pursuant to the findings of fact and conclusions of law dated February 1, 1988, final judgment is entered for the plaintiff, Hiram Walker & Sons, Inc., in the amount of $147,111.43 against the defendants Indian River Transport, Inc., and Eller & Company, Inc. Costs are awarded to the plaintiff.

DONE AND ORDERED in chambers, at Miami, Dade County, Florida, this 10 day of February, 1988.

U.S. DISTRICT COURT JUDGE

Appendix H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-0762-CIV-RYSKAMP

HIRAM WALKER & SONS, INC.,
Plaintiff,

vs.

KIRK LINE, R.B. KIRKCONNELL & BRO. LTD., JAMAICA MERCHANT MARINE ATLANTIC LINE LTD., ELLER & COMPANY, INC., INDIAN RIVER TRANSPORT, INC., and the "SS MORANT BAY," its engines, boilers, etc.,
Defendants.

Feb 02, 1988

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on before the court for trial on November 30, 1987, through December 2, 1987, and the court having heard and considered the testimony and other evidence presented in this case, does hereby enter its Findings of Fact and Conclusions of Law pursuant to Rule 62 of the Federal Rules of Civil Procedure. In making the following findings of fact, the court has weighed the evidence presented, considered the demeanor of witnesses who testified, and resolved conflicts in the evidence presented.

FINDINGS OF FACT

1. Plaintiff, Hiram Walker & Sons, Inc., ("Hiram Walker") seeks recovery for damages to a shipment of Tia

Maria liqueur which was carried in a forty foot tank from Kingston, Jamaica to the Port of Miami. After discharging the forty foot tank from the S/S Morant Bay at the Port of Miami, an effort was made by Eller & Company, Inc., (Eller) at the request of Indian River Transport, Inc., to transfer the cargo by gravity flow from the ocean tank into an Indian River highway tank truck. During the transfer, an accident occurred and some of the contents of the ocean tank spilled.

2. The parties previously submitted Cross-Motions for Summary Judgment and in an order dated December 17, 1986, this court determined that Eller and Indian River were jointly and severally liable for the loss of the Tia Maria cargo. The matter before the court now concerns the assessment of damages and prorating fault between Eller and Indian River.

3. Hiram Walker has sued the defendants for the value of the Tia Maria contained in the forty foot tank, for the freight charges in transporting the cargo from Kingston to the Port of Miami, for costs associated with the destruction of the remnant cargo following the spill, and prejudgment interest. At trial, Dean Anderson, general traffic manager for Hiram Walker, testified that Hiram Walker had been paid in full by its insurance carrier, Aetna Insurance Company, for the full value of the cargo, the ocean freight, and costs associated with destroying the cargo.

4. Tia Maria is a coffee-based liqueur manufactured by Estate Industries, Ltd. in Kingston, Jamaica. The liqueur is sold to Hiram Walker and shipped from Kingston to Hiram Walker's various bottling facilities in the United States. Tia Maria is a temperature sensitive product because of its alcoholic content, and is subject to evaporation.

5. The liqueur was produced on March 6 and 8 of 1985 by Estate Industries Limited at Kingston, Jamaica. The 5000 gallons were originally a part of 2 batches of liqueur made on those dates shown on the Vatting Transaction

Records.

6. Linford Gordon, a process supervisor for Estate Industries, received in-house instructions from Estate Properties Export Department dated March 15, 1985 which ordered the export to the plaintiff of the 5000 gallons via Kirk Line Tank No. 24. Gordon supervised the transfer from the Estate Industries vat into Tank No. 24. The transfer took place on March 20. 1985. After the transfer took place the quantity transferred was read directly from a calibration scale on the vat and the information transferred to a Semi-Finished Liqueur Container Record. A Jamaican customs' officer was on duty at the time of the transfer. After the transfer was effected, the manhole of Tank No. 24 was screwed on by bolts and was sealed with seal No. 001144. The discharge valve was also sealed. The tank was not leaking in any way when the transfer and sealing was completed.

7. Tank No. 24 was then held in bonded warehouse No. 2 at Estate Industries until it was removed on the morning of the 21st to the pier in the company of Estate Industries head of security, Mr. Dudley Henry. Prior to the movement of March 20-21 Kirk tank No. 24 had been utilized on prior occasions by Estate Industries for at least a year, and on those occasions it contained either 20,819.15 litres or 18,926.50 litres.

8. At about 8:45 AM on the morning of March 21, 1985, Tank No. 24 left Estate Industries Limited in the company of Mr. Henry and arrived at the pier some 12 to 14 minutes later. The tank remained at the pier until March 26. Henry regularly visited the pier to reinspect the tank on March 22 and 23 and 25 and 26. All seals were intact on each occasion, and there was no spillage seen.

9. Tank No. 24 was filled and shipped to the plaintiff pursuant to an annual purchase order. Mrs. Othaline Fox, senior shipping officer of Estate Industries Limited, received the purchase order and prepared for each of the 8 containers covered by that order, Jamaican government customs' form

E-17, part of which was prepared by Mrs. Fox and part of which was prepared by Jamaican customs. She prepared the commercial invoice, advised customs' brokers to prepare the bill of lading, received the bill of lading and sent it and the invoice to the plaintiff so that Hiram Walker could pay Tia Maria S.A. the cost of the goods.

10. The price invoiced to Hiram Walker was in effect for at least a year prior to the shipment. It was based on a price which Tia Maria S.A. instructed Estate Industries to invoice.

11. Tank No. 24 was loaded aboard the vessel Morant Bay on March 26, 1985. It was then in apparent good order and condition. There were no notations of bad order on Kirk's bill of lading. Kirk Line charged $2026.70 in freight for the bulk for transporting the bulk tank. The plaintiff paid $169,581.44 to Tia Maria S.A. and $2026.70 to Kirk Line.

12. The Trailer Interchange & Inspection Report and the log of the Morant Bay noted that there was some spillage from Tank No. 24. There was no evidence of how much. Michael G. Bernard, operations manager of Jamaica Freight & Shipping Co., Ltd., Kirk Line's agent, testified that movement of the tank of any sort would cause spillage but that it wasn't enough to warrant rejecting the tank or reporting it to Estate Industries, and that the notation was a standard one. At no time did either Kirk Line or Eller or Jamaica Freight & Shipping Co. Ltd. advise either Estate Industries or Hiram Walker that any spillage had occurred from Tank No. 24.

13. Upon arrival of the Morant Bay at the Port of Miami, Eller removed Tank No. 24 from the vessel on March 29, 1985 and placed it in its yard in preparation for delivery to Indian River. Between the time it was removed from the vessel and the time Indian River received it on April 1, 1985 the tank was in external good order and condition with no evidence of leakage. The Eller & Company delivery receipt indicated that it was "1-tank full". There

were no exceptions concerning leakage indicated on the Kirk Line loading report or the Eller & Company vessel activity report.

14. According to Eller's answers to the plaintiff's interrogatories 10(e) and 11 (g & k). Tank No. 24 did not break stow during the ocean voyage, was in good external condition at the time of its discharge from the vessel, and was in good external condition at the time of delivery to the consignee or its agents; i.e. Indian River.

15. Eller was hired and paid by the ocean carrier of this cargo, R.B. Kirkconnel & Bro., Ltd. (Kirk Line) to unload the Tia Maria in Miami, and to deliver it to the representative of Hiram Walker that came to pick it up (Indian River). These were the types of services that Eller normally performed for the various ocean carriers that hired it to complete the ocean carrier's responsibility of delivering cargoes in Miami to consignees.

16. Tank No. 24 remained at the Port of Miami until April 1, 1985. On that date, David Jones, a driver for Indian River Transport arrived with a highway tank transport and tractor to pick up the cargo. Jones then drove his tank and truck onto Eller's lot and parked it next to Tank No. 24 which had been positioned by Eller to effect what all parties thought was going to be a transfer of the cargo by pumping it into the Indian River equipment.

17. According to Dean Anderson, general traffic manager for Hiram Walker, Indian River was hired by Hiram Walker to pick up the Tia Maria cargo for inland transportation to one of the Hiram Walker's bottling facilities in the United States. By agreement between Indian River and Hiram Walker, Indian River was supposed to pump the cargo from Kirk Tank No. 24 into the Indian River tank. On April 1, 1985, David Jones attempted to hook up hoses and fittings to effect the pump transfer, but had forgotten an elbow and could not complete the hose connection between the two tanks.

18. Jones advised Eller longshoreman, Junior Marshall, of the missing equipment and requested that Eller perform a gravity feed. Jones had participated in a gravity feed at the port in West Palm Beach and was familiar with the process. Eller had performed this type of gravity flow transfer of cargo previously in the port without difficulty or problems. On April 1, 1985, Jones attached an elbow coupling to the back of Tank No. 24 and attached the hose to the coupling inserting the loose end of the hose through the hatch of the Indian River tank truck. Eller longshoreman, Daniel Wright, using a large capacity forklift, lifted Tank No. 24 high enough so that its contents would transfer into the Indian River tank by gravity flow.

19. Mr. Jones testified that the elbow fitting affixed to the back of Tank No. 24 also fit to the back of the Indian River tank and the elbow attachment could have affixed the hose to the back of the Indian River tank truck. Thus by inserting the loose end of the hose through the top of the hatch of Tank No. 24, the cargo could have been pumped out of Tank No. 24 into the Indian River tank. Mr. Jones did not suggest this method of pumping to the Eller longshoremen but instead, attached the fitting and hose to the back of tank No. 24 and inserted the loose end through the hatch of the Indian River tank and requested the gravity feed.

20. Eller employee Daniel Wright lifted Tank No. 24 into the air on a forklift but failed to use dunnage so that the forklift blades contacted, metal on metal with the base of Tank No. 24. Daniel Wright, was not authorized to operate forklifts of this size. His license authorized him to operate lift trucks with a capacity of 16,000 lbs. "Big Red," the forklift at issue, had a 60,000 lb. lift capacity.

21. Daniel Wright performed the gravity transfer based upon his own experience and expertise and no one gave him instructions on how to make the lift. Eller had a company procedure not to leave forklifts unattended while loads were suspended in the air. Wright observed Tank No. 24 begin to

shift out of balance, as did Elijah Marshall, his supervisor.

22. Daniel Wright and Elijah Marshall left Tank No. 24 suspended in the air on an unattended forklift for eight to ten minutes after they were aware that the forklift was unbalanced while they attempted to locate a second forklift to assist in the gravity transfer. A second forklift was not placed nearby before the transfer to assist in the event problems occurred. The second forklift was 200-300 ft. away. Daniel Wright had trouble starting it.

23. Tank No. 24 could have been lowered to the ground by Daniel Wright or Elijah Marshall before they sought another forklift which might have prevented the accident at issue, and which could have taken a total of 9 or 10 seconds. David Jones, the driver for Indian River could not do anything to prevent Tank No. 24 from falling after the forklift of Eller was abandoned. Mr. Jones was not told by Eller's employees Tank No. 24 had become unbalanced.

24. David Jones was unaware Tank No. 24 needed the identical type of fitting his truck needed in order to effect a transfer of the Tia Maria by pump. Mr. Jones had eight or nine various fittings with him when he arrived at Eller's lot which would cover many situations, but would not cover a transfer by pump from Tank No. 24.

25. Upon falling off the forklift, Tank No. 24 landed on its left side at about a 20 degree angle to the Indian River tanker. The manhole hatch of Tank No. 24 was open permitting the Tia Maria to spill. It was estimated by Jack Deckert, traffic manager for W.A. Taylor & Co., a Hiram Walker subsidiary company at Miami, that approximately 85 to 90% of the product was lost.

26. Deckert got to the scene about an hour and a half after the spill and stayed there for 1 1/2 hours. When he first got there Miami firemen were still hosing the area down and washing away a foam concentrate which they had sprayed on Tank No. 24 and the spilled liqueur. He saw them hosing down the area and the 2 tanks and between the 2 tanks while

he was there. He testified that during the course of watering down or hosing down the area that particles were being kicked off the pavement including foam, pebbles, bits of wood in the vicinity of the open hatch. It was his opinion that the Tia Maria that was left in Tank No. 24 probably was contaminated with all of the debris and water. Deckert saw water going into Tank No. 24 as it and the pebbles and debris were being kicked up around the open hatch.

27. Four Miami Fire Department companies responded. One, in command of Captain John A. Larney, cordoned off the area around the spill and immediately sprayed, in a rain-drop type spray, an alcohol foam concentrate on both vehicles and the immediate area around them. Captain Larney testified that when he got there, the hatch of Tank No. 24 was open and he actually saw the Tia Maria liqueur still spilling from the open hatch. He did not close the hatch nor did he permit any of his men to close the hatch because he felt that there was a serious hazard of fire and any spark could ignite the liqueur. He testified that spraying was done in the immediate vicinity of the open hatch and that he had one of his men dip an old milk carton type container found on the pier into the remaining Tia Maria liqueur through the open hatch in order to obtain a sample, which was then ignited with a match. In addition, an explosion meter was also put into the hatch. He testified that he knew of other spills of toxic materials on the pier and felt that in his opinion some of the water under high pressure which he and his men were using could very well have gotten into the open hatch. The firemen arrived at 10:31 AM and left at 1:33 PM.

28. Edwin Montz, Eller's director of safety, testified that he had received no reports that there was any spillage from Tank No. 24 before the transfer was effected and while it was in Eller's possession. He testified that in his experience if Tank No. 24 had been spilling contents at the time of shipment, it would have been rejected at Jamaica. David Jones testified that there was no evidence of spillage from

Tank No. 24 at the time that he prepared to make the pump transfer. Montz testified that on April 2nd, Indian River brought in a second tanker and transferred what remained in the damaged Indian River trailer into a new Indian River trailer, and then on April 10th Indian River transferred the product from Tank No. 24 into the new Indian River trailer, and that on July 1, 1985 the Indian River trailer containing the commingled lots was removed from the Eller facility. The second Indian River trailer was weighed on April 2 when it came in empty and then weighed again after the transfer, and that it was weighed both before and after the product from Tank No. 24 was put into it on April 10th. The end result was that there was something like 13,000 lbs. of product between the 2 tankers. When the Indian River tanker was removed on July 1, it was weighed full and then weighed empty after the product was destroyed. The Port of Miami seaport scale tickets indicated that 12,000 lbs. or 1500 gallons of Tia Maria was in the Indian River tanker at the time.

29. Dean Anderson, general traffic manager for Hiram Walker, testified that he learned of the incident through the media, communicated with Jack Deckert and Carter Hunt, executive vice president of Hiram Walker, and went to Miami on April 8, 1985 where he looked into both the Indian River tank and the Kirk tank and estimated that about 700 gallons remained in each. Based on conversations with Hiram Walker's in-house laboratory, Anderson agreed that both remaining lots of liqueur would be accepted. Accordingly, he advised Indian River to proceed to Miami, to first stop in at Howard S. Reeder, Hiram Walker's customs' broker, to pick up documentation and then proceed to the pier to pump the remaining liqueur in Tank No. 24 into the Indian River tank. This was to be accomplished on April 10, 1985. However, Carter Hunt, executive vice president of Hiram Walker, determined that the possibilities of contamination of the liqueur in Tank No. 24 were such that it could not be

accepted by Hiram Walker since it was a consumable product and ordered Dean Anderson to reject that portion. Anderson communicated with Indian River to rescind his order but learned that the driver had already left to make the pickup. He then communicated with Howard S. Reeder, the broker, and learned that the driver had not gone to the Reeder office as instructed but had gone directly to the pier and made the transfer on April 10, 1985. Thereafter Anderson advised Eller, Kirk and Indian River that the entire commingled quantity was being rejected. He supplied the defendants with samples of the product that could be analyzed by laboratories of their choice. None of the defendants had the samples analyzed or attempted to salvage the liqueur.

30. Harry G. Whitten of Howard S. Reeder, Inc. oversaw the destruction of the product on July 1, 1985 and submitted a bill in the amount of $146.25 to Hiram Walker for the destruction of the approximately 1400 to 1500 gallons of product. The destruction was done pursuant to U.S. Customs' order.

31. Carter Hunt, executive vice president of Hiram Walker, a chemical engineer and a licensed professional engineer, testified that he had authority to and did overrule his internal lab and rejected the product contained in Tank No. 24 and the later commingled product because of the serious possibility of contamination. He testified that it would have been impossible to detect all possible contaminants since tests must be specific. Hiram Walker's internal laboratory analysis did not address contamination. He said that the company simply could not risk putting a potable product on the market which could cause death or serious injury. He had seen the photos taken at the scene and reviewed reports from Jack Deckert and Dean Anderson. He testified that Hiram Walker paid for the shipment and that it was part of an annual purchase order of at least 8 tanks, and that Hiram Walker owned the product at the time of the loss. He testified that the price paid for the Tia Maria was in effect

for at least a year prior to the loss. He testified that in his opinion it was not economically feasible to salvage the Tia Maria by redistillation or otherwise. Redistilling, he said, would produce about $600.00 worth of product taking into account the costs of redistilling and the costs of transportation. Using it as bunker fuel likewise was not feasible because of the high sugar content of the commodity. Normal filtration would not remove the contaminants in solution.

CONCLUSIONS OF LAW

32. Hiram Walker sued Eller in admiralty and in diversity. Suit against Indian River was brought based on diversity and the Interstate Commerce Act. The amount in question exceeds $10,000.00 exclusive of interest and costs and this court has subject matter jurisdiction.

33. At the conclusion of the plaintiff's case and again at the conclusion of trial, Eller and Indian River requested dismissals because Hiram Walker was not the real party in interest. Dean Anderson, General Traffic Manager for Hiram Walker testified, Hiram Walker had been reimbursed in full by its insurance company, Aetna. Counsel for the plaintiff has represented to the court that he is handling this claim for Aetna Insurance Company which has received an assignment from the plaintiff. Ordinarily, this matter would be presented in the name of Aetna as the real party in interest. Rule 17A was designed to permit such claims by assignees but the rule does not prevent the claim from being presented in the name of the party who has sustained the initial loss. The rule was designed to prevent a defendant from being sued more than once for the same claim. The purpose of the rule is met here where the counsel for the plaintiff has stated on the record that he is bringing this claim for the use and benefit of Aetna. Although Aetna should have appeared as a party to this case, this defect does not warrant dismissal of the claim.

See Frank Briscoe Company, Inc. v. Georgia Sprinkler Company, Inc., 713 F.2d 1500, (11th Cir. 1983); 59 Am. Jur. 2d. Parties, Sec. 35.

34. It was the responsibility of the plaintiff to prove by a preponderance of evidence the amount of Tia Maria delivered to Eller prior to its spill on April 1, 1985. The evidence presented reflects discrepancies in the original measurement of the cargo loaded, some loss during evaporation of the cargo, and two spills of unknown amounts. On this factual basis, the court cannot determine the exact amount of cargo lost on April 1, 1985. However, since the total shipment consisted of 5,000 gallons, a loss of 1% would represent some 50 gallons. The evidence in this case does not support a loss in this amount. Indeed, it is difficult under the facts to support a loss of 20 gallons. As the finder of fact, the court concludes that, at most, the loss was 1/2 of 1 percent of the total shipment.

35. The court finds that the plaintiff had an adequate basis in fact for rejecting the Tia Maria that remained in Tank No. 24 due to the possibility of contamination. This product was designed for human consumption. Every caution should be exercised by the plaintiff to prevent contaminated goods from entering the stream of commerce. The court finds sufficient evidence to support the plaintiff's claim of contamination as to this product. The defendants had the burden of establishing that Hiram Walker's rejection was unreasonable under the circumstances. Bosnor, S.A. v. L.A. Barrios, 796 F2d 776, (5 Cir. 1986)

"In determining whether the victim's conduct falls within the range of reasonableness, the court must consider that the necessity for decision-making was thrust upon him by the defendant...and will allow the injured party a wide latitude in determining how best to deal with the situation." Tennessee Valley Sand & Gravel Co. v. MS Delta, 598 F2d 930 at 933, (3 Cir. 1979).

Hiram Walker's decision not to chance serious risk of

harm by making the product contained in Tank No. 24 available to the public was reasonable.

"It is frequently easy in cases like this to say, with the benefit of hindsight, that something different and better could have been done. But the situation must be viewed without the benefit of hindsight." Ellerman Lines, Limited v. President Harding, 187 F.Supp. 948, 951, (SDNY 1960), aff'd, 288 F2d 288, (2 Cir. 1961).

The plaintiff did fail to mitigate its damages when it ordered the contents of Tank No. 24 commingled with the contents of the Indian River trailer which were uncontaminated. Accordingly, the court finds that the defendants should not be liable for the product which was destroyed in the Indian River trailer. The court finds the amount of product improperly destroyed to be 701.71 gallons which had a value of $23,794.99. This computation is based upon the testimony of Edwin Montz and Harry Whitten. The Miami Seaport Scale Ticket No. 199551 indicated that 5,740 pounds of Tia Maria was in the Indian River tank after the spill. The testimony indicated that a gallon of Tia Maria weighed 8.18 pounds. 5,740 pounds divided by 8.18 produces 701.71 gallons at a price of $33.91 per gallon.

APPORTIONMENT OF DAMAGES

36. Between defendants Eller and Indian River, apportionment of damages must be made. The court initially notes that it has determined Eller and Indian River to be jointly and severally liable for the plaintiff's claim. Determining responsibility of each of these defendants, the court turns to the proportional fault doctrine which governs the actions of these defendants. Hercules, Inc. v. Stephens Shipping Co., 765 F.2d 1069, (11th Cir. 1985).

37. The evidence reveals that Indian River breached its contract with Hiram Walker by failing to bring all the

couplings necessary to effect a pump transfer of the cargo from Tank No. 24 into the Indian River tank. Indian River should have been familiar with Tank No. 24 and should have brought the proper fittings. Furthermore, Indian River should have secured proper fittings before requesting a gravity transfer from Eller.

38. Indian River was supposed to pump the cargo, but chose not to for its convenience because its driver did not have all the fittings he needed. Eller at the request of Indian River assisted in the gravity transfer. As determined in this court's Order of December 17, 1986, Eller was considered a volunteer in this transfer. Eller was also negligent in lifting Tank No. 24 in the air without dunnage and leaving the forklift unattended for eight to ten minutes after it was known that the load had become unbalanced. There was also testimony that the operator of the forklift was not licensed to operate a forklift of that size.

39. The court has previously found that the defendants were jointly and severally liable for the plaintiff's loss. But for the negligence on the part of Indian River in failing to bring the proper fittings, the loss would not have occurred. But for the negligence of Eller in lifting the tank and leaving it unattended, the loss would not have occurred. The court concludes that each defendant was equally negligent and apportions the negligence on a 50-50 basis.

40. The court declines to enter pre-judgment interest as this was not a liquidated claim.

41 . The court finds that the plaintiff should recover the amount of the invoice ($169,581.44) less .005 per cent representing the spillage ($847.91) and less the value of the product in the Indian River trailer ($23,794.99) or a total of $144,938.54 for loss of product, plus $2,026.70 for shipping charges and plus $146.25 for disposition of contaminated product (assuming the cost to be the same if only part of the commingled product was disposed of) for a total judgment of $147,111.43 for the plaintiff and against the defendants

Indian River and Eller. Costs will be assessed against the defendants. Judgment be entered in accordance with these findings and conclusions.

DONE AND ORDERED at Miami, Florida this 1st day of February, 1988.

U.S.DISTRICT COURT JUDGE

Appendix I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 86-0762-CIV-RYSKAMP

Filed December 17, 1986

Order Granting Partial
Summary Judgment

HIRAM WALKER & SONS, INC.,
Plaintiff,

vs.

KIRK LINE, R.B. KIRKCONNELL & BRO. LTD., JAMAICA MERCHANT MARINE ATLANTIC LINE LTD., ELLER & COMPANY, INC., INDIAN RIVER TRANSPORT, INC., and the "SS MORANT BAY," its engines, boilers, etc.,
Defendants.

THIS MATTER comes before the court on the motions of defendants, R.B. Kirkconnell & Bro. Ltd. (hereinafter referred to as "Kirk"), Jamaica Merchant Marine Atlantic Line Ltd. (hereinafter referred to as "Jamaica"), Eller & Company, Inc., (hereinafter referred to as "Eller") and Indian River Transport Inc., (hereinafter referred to as "Indian"), for partial summary judgment. The plaintiff, Hiram Walker & Sons, Inc., (hereinafter referred to as "Hiram"), has moved for summary judgment against all the defendants.

Initially, it should be noted that this action was brought in admiralty. Nevertheless, it is an established tenet that courts may, in analyzing maritime tort claims, and, often

do, rely on general principles of negligence law. See Daigle v. Point Landing, Inc., 616 F.2d 825 (5th Cir. 1980); S.C.Loveland, Inc. v. East West Towing, Inc., 608 F.2d 160, 165 (5th Cir. 1979).

The pleadings and depositions submitted by the parties to this action establish that no genuine issue of material fact exists. Fed.R.Civ.Proc., Rule 56(c). In fact, all the parties to this action have moved for summary judgment, thereby clearly indicating their accord that no genuine issue of fact remains to be resolved. In addition, this court points out that it recognizes that questions of negligence are usually reserved for the fact finder at trial. However, summary judgment is undoubtedly proper where, as here, "the facts are undisputed and only one conclusion may reasonably be drawn from them". Gans v. Mundy, 762 F.2d 338, 341 (3d Cir. 1985), cert. denied, 106 S.Ct. 537, 88 L.Ed.2d 467 (1985); see also Flying Diamond Corp. v. Pennaluna & Co., 586 F.2d 707, 713 (9th Cir. 1978). Accordingly, this court shall make a determination of negligence, on a motion for summary judgment, as a matter of law.

The uncontroverted facts unfolded in the following manner: On or about March 26, 1985, a bulk tank of semi-finished Tia Maria liqueur, owned by Hiram, was loaded aboard a motor vessel called the M/V Morant (hereinafter referred to as "Morant") in Kingston, Jamaica. Kirk had chartered the vessel from "Jamaica", the proprietor of the vessel, for the shipment of assorted cargo, including Hiram's liqueur. The tank containing the liqueur arrived fully intact on or about March 29, 1985, in Miami, Florida. Hiram engaged Indian to take receipt of the liqueur in Miami on its behalf, and transport it by land to New Jersey. Prior to the planned pick up, however, Eller, acting as a stevedore and agent of Kirk, unloaded the liqueur from the Morant and stored it in a warehouse.

On the morning of April 1, 1985, David Jones, an employee of Indian, arrived at the Port of Miami with the

intention of consummating a pumping transfer of Hiram's liqueur from the tank in which it was shipped, to a freight line trailer hauled by the vehicle operated by Jones. After greeting Jones, an Eller employee removed the liqueur from storage and aligned the tank with Jones' trailer. Jones then attempted to connect the proper hoses, pump, and fittings to effect the pumping transfer, but realized that a cam-lock fitting, a gadget customarily used to connect the hose to the pump, was missing. After deciding that the pumping transfer was impossible, Jones asked Junior Marshall, an employee supervisor of Eller, to assist him in effecting a gravity feed of the liqueur. A gravity feed, unlike a pumping transfer, required that the tank containing the liqueur be elevated to a height sufficient to allow sheer gravitational force to impel the liqueur in the tank to drain downward into the Indian trailer. This operation, of course, was intrinsically and conspicuously fraught with dangers and risks which would not have been present in a pumping transfer. It therefore seems plain that had Jones brought a cam-lock, the instrumentality needed to perform the transfer of liqueur properly, the accident resulting in Hiram's tank of liqueur being dropped and spilled, would never have occurred.

Acting on behalf of Indian, Jones had a duty to act reasonably in rendering services for Hiram. See Crockett v. Uniroyal, Inc., 772 F.2d 1524 (11th Cir. 1985). This court finds that he did not act reasonably when he neglected to bring the proper equipment to consummate the liqueur transfer, and his failure to do so was a direct and proximate cause of the accident which resulted in damages to property owned by Hiram. See Spurlin v. General Motors Corp., 528 F.2d 612, 615 (5th Cir. 1976). Consequently, Indian is jointly and severally liable to Hiram for the full loss suffered by Hiram. However, the extent of the damages suffered by Hiram must be substantiated before this court can assess the damages incurred by Hiram.

The next question is whether Eller is liable for its acts

in participating in the liqueur transfer, as it did, on the day of the accident. Eller has moved for summary judgment thus indicating its agreement that the facts in this action are undisputed. The pleadings and depositions establish that Daniel Wright, an employee of Eller, was directed by his supervisor, Junior Marshall, to assist the truck driver of Indian in effecting a gravity transfer of Hiram's liqueur from the Eller tank to the Indian vehicle. The gravity transfer was precipitated by the failure of Indian to provide the necessary equipment to pump the liqueur into Indian's truck. During this process, Wright lifted the Eller tank, on a forklift owned by Eller, to allow the Indian truck driver to adjust certain hose connections needed for a successful transfer. Approximately fifteen minutes into the transfer operation, Wright's supervisor instructed him to find a second forklift because the tank was not properly balanced on the forklift. Wright proceeded to leave the forklift, which was holding the tank suspended in mid-air, unattended for ten minutes. As he returned with a second forklift, he observed the Eller tank slide off the forklift. These facts make it clear that Eller should be held liable to Hiram for its role in this accident.

The basis for Eller's liability lies in the well-recognized doctrine of assumption of duty. "When one voluntarily assumes a duty, he is bound to perform it with care and, if done negligently, he is liable for damage[s] resulting from such negligence." Stauffer Chemical Co. v. W.D. Brunson, 380 F.2d 174, 182, (5th Cir. 1967); see also Kurzweg v. Hotel St. Regis Corp., 309 F.2d 746 (2d Cir. 1962); Hastorf Contracting Co. v. Ocean Transportation Corp, 4 F.2d 583 (S.D.N.Y. 1923). The assumption of a duty is precisely what Eller, through its employee, Wright, did when it volunteered to assist Indian in transferring the liqueur from its tank to the Indian truck. This court finds that Eller failed to act reasonably when its employee, Wright, abandoned the forklift holding Hiram's liqueur, in compliance with an order from his supervisor

Marshall, to search for a more suitable forklift. Had Wright lowered the tank to ground level or enlisted another Eller employee to supervise the forklift, while he searched for an alternate forklift, the subsequent spill of Hiram's liqueur would unquestionably have been avoided. Furthermore, it is manifest that the Eller employee's negligent conduct was a direct and proximate cause of the accident, see Becker v. Colonial Parking Inc., 409 F.2d 1130, 1137 (D.C. Cir. 1969), and resulted in substantial damage to property belonging to Hiram. Accordingly, Eller is jointly and severally liable to Hiram for the entire amount of its loss.

Indian maintains that even if it is liable to Hiram, its liability is limited to five hundred dollars. It claims that the bill of lading issued by Kirk, the carrier of the goods in question, to Hiram, explicitly incorporated the provisions of the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300 - 1315 ("COGSA"), which expressly limits a carrier's liability for damaged cargo to five hundred dollars per unit. Hiram asserts in its motion that Indian is not governed by the terms of COGSA. Hiram grounds this assertion on the premise that Indian is not a "carrier" as envisaged by §1301 of the Act. That section defines carrier as an "owner or [the] charterer who enters into a contract of carriage with a shipper." Hiram posits that Indian is not an owner or charterer within the meaning of the bill of lading pertinent to the present controversy; furthermore, they maintain, albeit tacitly, that Indian did not enter into a contract of carriage with Hiram. The court agrees with these contentions, see Pacific Employers Insurance Company v. M/V Gloria , 767 F.2d 229 (5th Cir. 1985), and concludes that Indian's liability is not circumscribed by COGSA, due primarily to its non-status as a carrier.

The determination of whether Eller's liability is capped by the bill of lading issued by Kirk depends on an interpretation of clause seventeen found in the bill. The relevant provision of that clause states that the "limitation of

liability and other provisions contained in the article shall inure not only to the agents, servants and employees, but also to the benefit of any independent contractors performing services including stevedoring in connection with the goods covered hereunder." It is well-settled that the parties to a bill of lading may extend any liability limitation that is mutually agreed upon, to non-carriers, such as agents and independent contractors. See Generali v. D'Amico, 766 F.2d 485 (11th Cir. 1985); Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297, 302, 79 S.Ct. 766, 769 (1959); Secrest Machine Corp. v. S.S. Tiber, 450 F.2d 285, 286 (5th Cir. 1971); Rupp v. International Operating Co., 479 F.2d 674 (2d Cir. 1973). This court finds, however, that the parties did not intend to extend the liability limitation in the bill to services voluntarily performed by Eller, for which it had not been contracted by Kirk to perform. As previously noted, Eller was a volunteer and acted only when Indian failed to provide the necessary equipment for the pumping operation. In Certain Underwriters v. Barber Blue Sea Line, 675 F.2d 266, 270 (11th Cir. 1982), the court held that extensions of a liability limitation to non-carriers reach solely to "persons engaged by the carrier to perform the functions and duties of the carrier within the scope of the carriage contract." Id. In the instant suit, Eller's involvement in the transfer of liqueur from the plaintiff's tank to Indian's truck was not a function or duty for which Kirk was responsible, nor one that Eller had been contracted to perform, and, therefore, does not fall within the ambit of the carriage contract. Eller's liability is thus not limited by the Himalaya clause (known as such in Admiralty law) contained in Kirk's bill of lading.

Regarding Kirk, the carrier of Hiram's liqueur from Kingston to Miami, there is simply no grounds upon which it may be held liable. Kirk fulfilled its obligations to Hiram at the point where Hiram's liqueur had been safely delivered to Miami, unloaded from the Morant, and placed in storage.

In light of this court's conclusion that Eller acted outside the scope of its agreement with Kirk, when it voluntarily agreed to assist Indian in a gravity transfer of Hiram's liqueur, it cannot be contended that Eller was acting on behalf of Kirk, in an agency capacity, during the transfer. Therefore, Kirk may not be held liable on agency principles or any other basis.

Likewise, Jamaica cannot be held accountable for the conduct and actions of parties, such as Indian and Eller, to whom it had no connection whatsoever. Moreover, Jamaica, the owner of the vessel which transported Hiram's liqueur, is, without doubt, not liable to Hiram for an accident with which it had no relation or nexus.

Therefore, after careful review of the record and the court being fully advised in the premises, it is;

ORDERED and ADJUDGED that the defendants, Kirk and Jamaica's motion for summary judgment is granted; Indian and Eller's motion for summary judgment is denied; and the plaintiff Hiram's motion for summary judgment on liability is granted against Eller and Indian, but denied as to Jamaica and Kirk. The court reserves judgment on the assessment of damages.

DONE and ORDERED at the United States District Courthouse, Miami, Florida this 16th day of December, 1986.

Kenneth L. Ryskamp
UNITED STATES DISTRICT COURT JUDGE

Appendix J

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed Nov - 1 1994

No. 93-4346

Miguel J Cortez
Clerk

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellant,

versus

KIRK LINE, R.B. KIRKCONNELL & BRO. LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE LTD.; ELLER & COMPANY INC.; INDIAN RIVER TRANSPORT INC.; and SS MORANT BAY, its engines, boilers, etc.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and RONEY, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be

polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

Appendix K

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 93-4346
D.C. Docket No. 86-762-CIV

Sep 1, 1994

HIRAM WALKER & SONS, INC.,
Plaintiff-Appellant,

versus

KIRK LINE, R.B. KIRKCONNELL & BRO. LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE LTD.; ELLER & COMPANY INC.; INDIAN RIVER TRANSPORT INC.; and SS MORANT BAY, its engines, boilers, etc.,
Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

Before TJOFLAT, Chief Judge, DUBINA, Circuit Judge, and RONEY, Senior Circuit Judge

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is

hereby AFFIRMED;

It is further ordered that plaintiff-appellant pay defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

DUBINA, Circuit Judge specially concurred and filed an opinion. TJOFLAT, Chief Circuit Judge, dissented and filed an opinion.

Entered: September 1, 1994
For the Court: Miguel J. Cortez, Clerk

By: *Matt Davidson*
Deputy Clerk

ISSUED AS MANDATE: DEC 05 1994

(2)

No. 94-1288

Supreme Court, U.S.
FILED
FEB 22 1995
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1994

HIRAM WALKER AND SONS, INC.,

Petitioner,

vs.

ELLER & COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

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QUESTIONS PRESENTED FOR REVIEW

Questions presented for review are stated by the Petitioner. Eller & Company, Inc. does not agree that these issues are proper for review.

LIST OF PARTIES

The parties to the proceeding are:
Petitioner: The Aetna Insurance Company ("Aetna")
Respondent: Eller & Company, Inc. ("Eller")[1/]

It is Eller's position that Hiram Walker & Sons, Inc. ("Hiram Walker") has no standing to file this Petition, because it was judicially determined in the underlying litigation in February of 1988 that the proper party plaintiff was Aetna Insurance Company. This determination has been made by the United States District Court for the Southern District of Florida and affirmed by the Eleventh Circuit Court of Appeal.[2/]

It is unclear why the Petition identifies Kirk Line, R.B. Kirkconnell & Bro. Ltd., Jamaica Merchant Marine Atlantic Line, Indian River Transport, Inc. and the S/S MORANT BAY as Respondents on its cover page. The MORANT BAY was never a party to this litigation because it was never served. R.B. Kirkconnell & Bro. Ltd. and Jamaica Merchant Marine Atlantic Line were dismissed by the District Court on December 16, 1986, and this dismissal, which subsequently proved to be on erroneous legal grounds, was never appealed.[3/] Indian River settled its dispute with Aetna/Hiram Walker in December of 1989 and since then, has not been a party to this litigation.[4/]

1/ [Parent: Carey Energy Corporation]

2/ See Petitioner's Appendix, pages 36a, 69a, 74a, 83a. Throughout, references to the Appendix to Petition will be "Pet. App., p." To avoid duplication, the decisions in the Petition Appendix have not been reproduced here.

3/ See Pet. App., pp. 93a and 94a; Pet., p. 20.

4/ See Pet. App., p. 37a.

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The Respondent will rely upon and refer to the Appendix references provided in the Petition for Writ of Certiorari, and will use the page references provided therein identified as "Pet. App., p. ___."

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Hiram Walker has no standing to bring this Petition. In 1988, it was conclusively determined that the proper party plaintiff was Aetna Insurance Company. (*See* Pet. App., pp. 36a, 69a, 74a and 83a) The facts of this case are unique, and do not present a question of law of widespread significance. The legal holding is based on and limited to the specific unique factual findings made by the District Court, which the Eleventh Circuit has found not to be clearly erroneous. (*See* Pet. App., pp. 7a - 11a, and 28a)

The positions asserted by the Petitioner have the same lack of substance as the Eleventh Circuit found in Petitioner's argument in the third appeal which it described as "baseless" and "unfounded". (*See* Pet. App., pp. 8a and 12a)

OPINIONS BELOW

The only opinion below which is material to this Petition is the last decision of the Eleventh Circuit, which appears on pages 1a through 20a of the Appendix attached to the Petition. The appeal giving rise to that decision asked the Eleventh Circuit to hold that the factual determinations of the District Court for the Southern District of Florida were clearly erroneous. (*See* Pet. App., p. 7a) These factual

determinations appear in the District Court Findings of Fact and Conclusions of Law dated August 6, 1990 (***See*** Pet. App., pp. 36a through 52a) which were supplemented by the District Court by amendments contained in its Order of March 10, 1993. (***See*** Pet. App., pp. 21a - 24a)

The Trial Court has twice determined that Eller is entitled to limit its liability for the casualty which is the subject of this litigation to $500, because at the time the tank of Tia Maria was dropped, Eller was fulfilling the ocean carrier's obligation to deliver the cargo to the consignee. This determination is uniquely factual and based upon the terms of the ocean carrier's bill of lading.

STATUTES INVOLVED

Contrary to Petitioner's assertion, ***The Harter Act***, 46 U.S.C. § 190, ***et seq.***, has no application to this case, because the parties clearly contractually agreed in the bill of lading that the terms of ***The Carriage of Goods Sea Act (COGSA)***, 46 U.S.C. § 1300, ***et seq.***, would govern during the entire time the ocean carrier had possession of the Tia Maria. (***See*** Pet. App., pp. 14a, 33a and 45a)

STATEMENT OF THE CASE

Petitioner's "Statement of the Case" contains numerous errors and omissions. They range from relatively harmless to significant. Some of the Petitioner's statements are misleading "half truths". The Petitioner's sequential presentation of its Statement of the Case, particularly as it reflects early holdings of the District Court, is misleading

because it does not state the District Court's final conclusion. There is no question that the District Court originally, in denying Eller the benefit of the $500 per package limitation, erroneously concluded that Eller was acting outside of the scope of the obligations of Kirk Line (the ocean carrier) when the accident occurred. However, after further consideration in two trials and two appeals, the District Court stated clearly that it was its factual determination that Eller was acting within the scope of the ocean carrier's obligation to deliver the cargo of Tia Maria at the time of the accident. Thus, Eller was entitled to the $500 per package limitation. (*See* Pet. App., pp. 24a and 52a)

Another significant misrepresentation in the Petitioner's Statement of the Case is the suggestion that Hiram Walker is the Petitioner. As previously pointed out, the Petitioner is Aetna Insurance Company. Both the District Court and Eleventh Circuit generously deemed the plaintiff's pleadings constructively amended (*See* Pet. App., pp. 36a, 69a, 74a and 83a), but at this point, further generosity is unwarranted. Aetna actually being the plaintiff is significant, because it reflects reality in this case, and what occurs in the vast majority of ocean shipments. Shippers, consignees, and freight forwarders involved in the movement of cargoes in ocean commerce to and from the United States know very well that their claims for cargo damage against the ocean carrier or its agents, including independent contractors, will be limited to $500 per package, unless they declare the value of their cargo, and pay a significantly higher freight rate. However, they generally protect themselves from risks of loss or damage to their cargoes by insuring them. The cost of the necessary marine insurance is much less than the higher ocean freight which would be charged if the value of the cargo was declared to the ocean carrier to defeat its ability to limit its liability to $500 per package. Aetna

Insurance Company and all other insurers providing coverage for ocean cargoes moving to and from the United States are very aware that virtually all ocean carriers engaged in this trade use bills of lading which extend the $500 per package limitation to the entire time that the goods are in the custody of the ocean carrier, directly or through the activities of its agents and independent contractors. Nevertheless, over the years, marine insurers trying to appear as unwitting cargo owners have tried repeatedly to circumvent the $500 per package limitation. Aetna's petition here, as well as its course of handling the litigation below, is a clear example of that.

Aetna's assertion that the tank of Tia Maria was in good order and condition when it arrived and was discharged in Miami is inaccurate. The District Court's actual determination, which has been found by the Eleventh Circuit not to be clearly erroneous, was that the cargo of Tia Maria spilled both before it was loaded aboard the MORANT BAY and during the voyage from Kingston to Miami. (*See* Pet. App., pp. 76a and 84a)

Aetna's statement that "Hiram Walker, Kirk Line and Eller agreed that Hiram Walker alone was responsible for arranging transfer of the Tia Maria from the Kirk Line tank to the Indian River tank"[5/] is a misleading half truth, which originally misled the District Court to grant summary judgment in favor of the Plaintiff and to deny Eller the right to limit its liability. The full truth, as the District Court learned when the case was later tried, was that Eller and Kirk Line's activity would only have ended if Indian River had been able to pump the cargo out of the Kirk Line tank and a delivery receipt and gate pass were issued to Indian River. (*See* Pet.

[5/] *See* Petition, p. 13.

App., pp. 22a - 24a, 39a, 49a - 52a) Further, as the District Court ultimately learned, Kirk Line was paid a separate fee to do whatever was necessary to transfer physical possession of the Tia Maria to the consignee. (*See* Pet. App. p. 38a - 39a, 43a, 51a) On numerous occasions before the accident involved here, in discharging Kirk Line's responsibility, Eller had done what was necessary to provide gravity transfers for the Tia Maria cargoes when Indian River, the consignee's agent, had arrived without appropriate equipment for transfer by pumping. (*See* Pet. App. p. 5a and 43a) Petitioner's suggestion that transfer was complete upon mere alignment of the two trailers initially in this litigation and now, is misleading and inaccurate in light of the fact that the Eleventh Circuit found this factual determination not to be clearly erroneous. (*See* Pet. App. pp. 7a - 12a, 28a) The ocean carrier charged and was paid a fee reflected on its bill of lading for the work that Eller was doing at the time of the accident involved here. (*See* Pet. App. pp. 38a - 39a) Eller billed the ocean carrier for the work that was being done when the accident occurred, and the ocean carrier paid that bill. Because the shipper paid the carrier for the service, and the carrier in turn paid Eller, it is unreasonable, as the Eleventh Circuit concluded, to assert that this work was outside of the scope of the ocean carrier's responsibility to deliver the Tia Maria to the consignee.

An additional point that Petitioner has not clearly presented is that the tank in which the Tia Maria was carried from Jamaica to Miami belonged to the ocean carrier, Kirk Line, and was not capable of being used to transport this product on roads in the United States. Thus, as long as the Tia Maria remained inside that tank, it was in the actual physical possession of Kirk Line through its ownership of the tank, and its agent's physical control over the premises where the tank was located and the tank itself. Hiram Walker's

witnesses, and the witnesses of its agent, Indian River, clearly testified that as long as the Tia Maria remained in Kirk Line's tank, if it was damaged or the tank itself containing the Tia Maria was stolen, that would be Eller and in turn, Kirk Line's responsibility. (*See* Pet. App. pp. 50a - 51a)

REASONS FOR DENYING THE WRIT

THE DECISION BELOW PRESENTS NO IMPORTANT UNANSWERED QUESTIONS OR CONFLICTS WITH SUPREME COURT, FEDERAL CIRCUIT COURT AND STATUTORY LAW

(a) Maritime Claim[6/]

In the first section of the Petition, the Petitioner seems to be arguing, in part, that there is no federal jurisdiction because the claim is outside the scope of ***The Carriage of Goods by Sea Act***, 46 U.S.C. § 1300, ***et seq.*** This argument seems to lose sight of the fact that ***COGSA*** is a substantive body of law, and that the jurisdictional provision concerning maritime claims is set out in 28 U.S.C. § 1333. Further, Petitioner ignores the final factual determination, which the Eleventh Circuit affirmed as not clearly erroneous, that at the time of the casualty involved here, Respondent was fulfilling the ocean carrier's obligation to deliver

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[6/] The Respondent has used a similar heading here as used by Petitioner, but it is unclear what the significance of Petitioner's heading actually is. Respondent's heading is to facilitate the identification of the argument presented in opposition to that which appears on pages 16 through 18 of the Petition.

physical possession of the Tia Maria to the consignee's representative. The District Court determined, and the Eleventh Circuit affirmed, that when the tank was dropped, Eller was discharging the responsibility of Kirk Line to provide such handling as was necessary in the Port of Miami, following discharge of the cargo from the vessel that brought it from Jamaica, to transfer physical possession to the consignee. This was clearly within the scope of the ocean carrier's duty, based on the terms of and charges set out on the ocean carrier's bill of lading. Hiram Walker paid Kirk Line an additional $200 for this delivery service and that charge was stated on the bill of lading. (*See* Pet. App. p. 38a) Kirk Line, in turn, paid Eller $74.74 to provide this service. (*See* Pet. App. p. 38a)

In passing, it may be helpful to explain that in the ocean shipping business, there is a separation of services that are usually provided by companies like Eller to ocean carriers. These consist of stevedoring and terminal handling. Stevedoring refers to the actual loading or unloading of cargo from the ocean-going conveyance, which in this day and age is usually a ship or a barge. Terminal handling, on the other hand, consists of storing the cargo after it has been discharged from the ocean-going vessel, and moving it or otherwise handling it as may be necessary when the consignee or its agent, like Indian River in this case, arrives to pick up the cargo.[7/] Unfortunately, the fine distinction between activities which constitute stevedoring and those which

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[7/] Although not relevant here, in a situation where cargo is being shipped rather than received, the terminal handling would consist of receipt of the cargo at the port of loading, and its movement and placement at a temporary place of storage (point of rest) awaiting the arrival of and actual loading on the ocean carrying conveyance.

constitute terminal handling are not always clearly understood or delineated in reported decisions.

In the first section of the Petition, Hiram Walker acknowledged that: "By virtue of the bill of lading's 'clause paramount' Kirk Line applied COGSA to all stages of the shipment and at all times that the goods were in the custody of the carrier." (*See* Petition, pps. 16 - 17) But it goes on to assert that this court's decision in ***Robert C. Herd & Company, Inc. v. Krawill Machinery Corp.***, 359 U.S. 297 (1959) should be revisited because the courts below have expanded interpretation of that case beyond what was intended. This assertion is untrue in this case. The Petitioner goes on to suggest that:

> This case presents the important unanswered question of whether a terminal operator which is under no obligation to the carrier to undertake the act which results in damage in a non-maritime situs, although originally engaged by the carrier nevertheless, enjoys the limitation of liability provisions of an ocean bill of lading and the Carriage of Goods by Sea Act, both clearly maritime in nature and application. [Emphasis added; *See* Petition, p. 18]

There certainly is good reason that this question remains unanswered in this litigation, and that there is no reason for this Court to answer that question. That question has nothing to do with this case. Both the trial and appellate courts below have explicitly determined that at the time the Tia Maria was dropped, Eller was completing Kirk Line's obligation to deliver physical possession of the Tia Maria to Indian River, the consignee's representative. The Trial Court made that determination twice (*See* Pet. App., pp. 21a, 23a - 24a, 49a, 52a), and the Eleventh Circuit's last decision affirms that factual determination, characterizing the

Petitioner's argument that it was clearly erroneous as "baseless" and "unfounded." (*See* Pet. App., pp. 2a, 8a, 12a) Those characterizations would also apply to the Petitioner's assertion that the damage occurred at "a non-maritime situs". The accident involved here occurred within the confines of the Port of Miami in a terminal yard operated by Eller immediately adjacent to the dock where the MORANT BAY was unloading on the Friday immediately preceding the Monday on which Indian River arrived to pick up the Tia Maria. About the only way the situs of this accident could be more "maritime" is if it occurred aboard the ship.

Under any circumstances, the question of situs is not controlling. This Court has long held that the locality test is not controlling. ***Executive Jet Aviation, Inc. v. City of Cleveland***, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972). The question is whether the operative facts show a substantial relationship between the activity giving rise to the incident and traditional maritime activity. ***Sisson v. Ruby***, 497 U.S. 358, 110 S.Ct. 2892 (1990); ***Foremost Ins. Co. v. Richardson***, 457 U.S. 668, 102 S.Ct. 2654, 73 L.Ed.2d 300 (1982). Clearly, the activity involved here is "traditional maritime activity."

(b) Clarity[8/]

The Petitioner's assertion that there is some "lack of clarity" concerning interpretation of ***Robert C. Herd & Co.***

[8/] The Respondent has used a similar heading here as used by Petitioner, but it is unclear what the significance of the Petitioner's heading actually is. The Respondent's heading is to facilitate the identification of the argument presented in opposition to that which appears on pages 18 through 19 of the Petition.

v. Krawill Machinery Corp., 79 S.Ct. 766, 359 U.S. 297 (1959), and cases interpreting it is inaccurate in general, but certainly is untrue concerning its application to this case. Both the Trial Court and the Eleventh Circuit found that the terms of the bill of lading were broad enough and clear enough to extend the $500 per package limitation to Eller, so long as the work that it was doing at the time of the accident was within the scope of the work which the ocean carrier had contractually undertaken based upon the terms of the bill of lading. (*See* Pet. App., pp. 2a, 4a, 21a, 23a - 24a, 39a, 52a) The Petitioner even acknowledges this. (*See* Petition, pp. 16 - 17). As previously noted, the Trial Court factually determined that Eller was performing the duties of Kirk Line at the time of the accident involved here, and the Eleventh Circuit, despite the Petitioner's argument to the contrary, found that that factual determination was not clearly erroneous.

The Petitioner in its argument entitled "Lack of Clarity" (*See* Petition, p. 18) alleges that Eller was acting "without authorization" or in some other manner outside the scope of its responsibility or usual work. This is simply untrue. The trial testimony reflected Kirk Line expected that Eller would do everything necessary to see that the Tia Maria and all other cargoes which it handled at the request of Kirk Line were delivered into the physical possession of the consignees. (*See* Pet. App., p. 43a) The Eller employees responsible for the actual delivery of the Tia Maria testified that on numerous occasions prior to this accident, Indian River had arrived without appropriate connections to pump the cargo out of the Kirk Line tank, and that gravity feeds had been successfully done. (*See* Pet. App., pp. 9a - 11a, 78a)

The Petitioner's argument that the subject bill of lading lacks clarity is not well taken. Its suggestion that a

literal reading of the relevant clause in the bill of lading could give rise to an interpretation that would have given Indian River benefit of the per package limitation is unreasonable. It would require the court to ignore the fact that the Kirk Line bill of lading contained a $200 charge to Hiram Walker for the handling that was necessary to deliver the cargo to the consignee after it was discharged from the ship. Eller in turn was paid by Kirk Line, and from previously unloading and delivering Kirk Line cargoes Eller knew that it was to do whatever was necessary to put the Kirk Line cargoes into the physical possession of the relevant consignees or their agents who arrived to pick them up. Eller was paid for this service by Kirk Line. Indian River, on the other hand, received its instructions from and was paid by Hiram Walker. Repeatedly the Petitioner is asking this court to consider legal issues which do not arise out of the facts of the underlying litigation.

The Petitioner's reference to ***Schiess-Froriep Corp. v. S/S FINNSAILOR***, 574 F.2d 123 (2d Cir. 1978), has no probative value. It merely is a Second Circuit decision which reverses the entry of a summary judgment, for the same reason that the Eleventh Circuit originally reversed the entry of a summary judgment in this case, i.e., because it found there were material issues of fact in dispute concerning on whose behalf the terminal operator was acting while loading cargo aboard a consignee's truck.

(c) Delivery[9/]

The only determination of liability in favor of the Petitioner was in 1987 when the District Court granted summary judgment against the Respondent upon a determination that its negligence caused the Tia Maria to be dropped and spilled in Miami. Eller has never disputed that its negligence caused the relevant accident, but it has always asserted that its liability was limited to $500. Also, in the District Court's original granting of the motion for summary judgment, it dismissed the plaintiff's claims against R.B. Kirkconnell & Bro. Ltd., and Jamaica Merchant Marine Atlantic Line, the actual vessel owner, because it had erroneously determined that Eller was not acting within the scope of its duties as an agent of Kirk Line at the time of the accident. Now, for the first time in the almost 9 years that this litigation has been pending, the Petitioner makes the inappropriate argument that the dismissal of Kirk Line and Jamaica Merchant Marine Atlantic Line is "law of the case" binding on Eller. This is preposterous. The history of this case reflects that the District Court's original determination that Kirk Line and Jamaica Merchant Marine Atlantic Line were not responsible for this loss was erroneous. The Eleventh Circuit's first and second opinions held that whether the cargo had left the possession of the ocean carrier at the time of the accident was a question of fact, and in its third opinion, the Eleventh Circuit recognized that the District Court's two decisions factually determining that the ocean

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[9/] The Respondent has used the same heading here as used by Petitioner, but it is unclear what the significance of this heading is. It is used by Respondent to facilitate the identification of the argument presented in opposition to that which appears on pages 19, 20 and 21 of the Petition.

carrier was still responsible for the Tia Maria at the time it was dropped was not clearly erroneous. In the appeals taken by the Petitioner, it argued on each occasion that the Eleventh Circuit should reverse the case because the District Court's factual determinations were clearly erroneous. On each of the last two occasions that the Eleventh Circuit has considered this case, it held that the District Court's factual findings were not clearly erroneous. Now, having repeatedly failed with that argument, the Petitioner asserts to this Court a legal argument which is erroneous. Legal determinations, right or wrong, which were made against parties other than Eller in this litigation are not binding upon Eller, i.e., they are not law of this case. But in any event, after this case was originally remanded by the Eleventh Circuit, the District Court recognized that its determination that the accident occurred after the ocean carrier's obligations had been fulfilled was wrong! The District Court's consistent factual determination after the summary judgment was reversed, which with equal consistency has been affirmed by the Eleventh Circuit, is that Eller was performing the ocean carrier's work when the accident occurred.

Next, Petitioner suggests that the Eleventh Circuit's most recent decision in this case conflicts with decisions of the Fifth and District of Columbia Circuits in ***F.J. Walker Limited v. M/V LEMONCORE***, 561 F.2d 1138 (5th Cir. 1977) and ***American President Lines, Ltd. v. Federal Maritime Board***, 317 F.2d 887 (D.C. Cir. 1962), respectively. That position is incorrect. Neither of these cases deal with contracts of carriage in which the provisions of ***COGSA*** were extended to the entire period of time that the carrier had custody of the cargo, unlike the situation before this Court. In the ***LEMONCORE***, ***supra***, the Fifth Circuit merely held that an ocean carrier was liable to the consignee of a shipment of frozen meat which was discharged faster

than it could be placed in a cold storage plant, which resulted in thawing damage to the meat. The statement that ***COGSA*** does not cover damage ashore is only accurate if the terms of the bill of lading have not extended the application of ***COGSA*** to cargo handling ashore, i.e., terminal operations. However, this is widely done and recognized to be appropriate as the Eleventh Circuit held here. ***See also Brown & Root, Inc. v. The M/V PEISANDER***, 684 F.2d 415 (5th Cir. 1981).

The ***American President Lines*** case, ***supra***, dealt with the custom and practice in the Port of New York "absent a special contract" concerning delivery of cargoes at an unspecified time prior to 1961. There is no basis upon which the Petitioner can suggest that the custom and practice prior to 1961 in the Port of New York was the same as it was in the Port of Miami in April of 1985. But more importantly, the terms of the contract of carriage in our case are "a special contract" which required physical possession of the cargo to be delivered to Indian River, and Hiram Walker paid Kirk Line for this service. This is supported by the terms of the bill of lading, and the fact that the Tia Maria was shipped in Kirk Line's tank which could not leave Eller's terminal. The factual circumstances of our case are unique, and involve a cargo that was not boxed, bottled, or packaged in any way. The physical transfer of possession, out of Kirk Line's tank, by pumping or gravity feed, had to occur for Eller to complete Kirk Line's responsibilities under its bill of lading.

(d) Property Delivery[10/]

Next, the Petitioner recognizing the weaknesses of its preceding arguments, asserts that if an ocean carrier or its agent negligently damaged the cargo in the process of completing the carrier's delivery obligation, they have no right to limit liability under the per package limitation of ***COGSA***. It is fair, equitable and adds certainty to the law for the agents of an ocean carrier fulfilling the carrier's obligation to a cargo owner to have duties and potential liabilities which are co-extensive with the ocean carrier for whom it acts. This is what has arisen since this Court's decision in ***Robert C. Herd & Co. v. Krawill Machinery Corp., supra.*** Today, because of the widespread incorporation of ***COGSA*** into bills of lading and the extension of all defenses available to the ocean carrier to its agents through the terms of bills of lading, shippers, consignees, freight forwarders, insurers of ocean freight, ocean carriers and their agents, including stevedores and terminal operators who act as independent contractors, all know of the existence and the

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10/ The Respondent has used the same heading here as used by Petitioner, but it is unclear what the significance of this heading actually is. It is used by Respondent to facilitate the identification of the argument presented in opposition to that which appears on pages 21 through 24 of the Petition.

ramifications of the "$500 per package limitation" which had its origin in ***COGSA***.[11/]

The suggestion that the Eleventh Circuit's decision below is in conflict with its decision in ***Phillip Morris v. American Shipping Co., Inc.***, 748 F.2d 563 (11th Cir. 1984) and the Fifth Circuit's decision in ***Baker Oil Tools, Inc. v. Delta S.S. Lines, Inc.***, 562 F.2d 938 (5th Cir. 1977) is inaccurate. Both of these cases involved situations where there was an interruption of the transportation that would not normally be contemplated under the ocean bill of lading. In the ***Phillip Morris*** case, ***supra***, the cargo was delivered to American Shipping over 60 days before the cargo was loaded aboard the carrying vessel, and there was an additional delay of approximately a month and a half after the cargo arrived at the port of discharge. Thus, the district court in that case concluded and the Fifth Circuit affirmed a determination that at least some of the damage occurred before the limitation provisions of the bill of lading would be applicable, and since the ocean carrier could not show what damage occurred during the reasonable period of time required for the transportation, the ocean carrier would be responsible for all the cargo damage. Similarly, in the ***Baker Tools*** case, ***supra***, the ocean carrier, without notice to the shipper, diverted its vessel to a different port and the cargo was never picked up. When the shipper discovered this, and sought to reclaim its

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11/ The ramifications are that if the value of the cargo is not declared and a higher freight rate paid, the ocean carrier and all of its agents and independent contractors will be entitled to limit damage claims against them to $500 per package, and if the shipper knows that the package is worth substantially more than $500, it has the option to protect itself with insurance, or by declaring a higher value to the ocean carrier and paying a higher freight rate.

cargo, it could not be located, and the Fifth Circuit held: "that Delta's [the ocean carrier's] unilateral cancellation of the port of call operated to terminate the limitation provision and that Delta continued to maintain custody of the equipment with the full liability exposure of a common law bailee," ***supra***, 562 F.2d 940. In both of these cases, the ocean carrier had caused delay in the cargo movement, and the courts found that to have been the basis upon which to deny the ocean carriers' right to limit their liability. There was no delay caused by the ocean carrier or its agent in our case.

(e) Deviation.[12/]

The Petitioner's final argument is tantamount to the assertion that anytime cargo is negligently damaged, that constitutes a deviation, which would defeat ***COGSA*** defenses, including the limitation provisions, because damage to the cargo was not what the shipper "bargained for, or expected."

There is no contradiction in the evidence that on numerous occasions before the accident involved here, Hiram Walker's agent, Indian River, had repeatedly arrived at the Port of Miami without the necessary equipment to pump the Tia Maria from the Kirk Line tank to the Indian River tank for in-land transportation. (***See*** Pet. App., pp. 9a and 77a - 78a) Although senior Hiram Walker officials testified they were unaware of the gravity feed, certainly Hiram Walker

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12/ The Respondent has used the same heading here as used by Petitioner, but it is unclear what the significance of this heading actually is. It is used by Respondent to facilitate the identification of the argument presented in opposition to that which appears on pages 24 and 25 of the Petition.

was charged with knowledge that its agent, Indian River, acquired over time, that gravity transfers were being made.

Next, the Petitioner asserts the risk of the gravity transfer was so great as to constitute a "deviation" or fundamental breach of Kirk Line's marine transportation contract. This argument requires this Court to ignore reality. Handling the large cargoes, which are loaded on and off ships and through the ports of this country, is dangerous work. The numerous decisions of this Court alone confirm that. Review of reported federal decisions would reflect hundreds, if not thousands of decisions, where large, heavy pieces of equipment are lifted with forklifts, cranes and/or other equipment resulting in damage to maritime cargo and/or injuries and death to seamen, longshoremen, and harbor workers. Lifting the Kirk Line tank to perform the gravity feed was not unusually dangerous. It had been done successfully on numerous occasions before this accident. (*See* Pet. App., p. 78a) The piece of equipment involved here had been used on many occasions to lift pieces of equipment as large as the Kirk Line tank without any difficulty. However, Eller has never disputed that it was negligent for its employee to get off the forklift and to walk away from the machine with the Kirk Line tank elevated. He should not have left the Kirk Line tank up in the air while the machine was unattended. He should have lowered the tank to the ground, and temporarily discontinued the unloading until whatever other equipment was needed was obtained. Regardless of whatever other issues may arguably have constituted negligence in this case, none of those created a situation where it can be said that there was a total destruction of the contractual relationship such that the terms of the bill of lading would no longer govern the relationship between Kirk Line, Eller and the cargo owner.

Also in the last section of the Petition, it is argued that the Eleventh Circuit's decision conflicts with the holdings of ***St. John's N.F. Shipping Corp. v. S.A. Companhia General Commercial Do Rio De Janeiro***, 44 S.Ct. 30, 263 U.S. 119 (1923) and ***Nemeth v. General S.S. Corp. Ltd.***, 694 F.2d 609 (9th Cir. 1982). There is no conflict with these decisions. The ***St. John's*** case, ***supra***, stands for the proposition that the shipment in 1918 of 800 barrels of rosin from New York to Brazil on deck of the Schooner ST. JOHN without explicitly disclosing in the bill of lading that the cargo was stowed on deck, when there was no custom and practice in New York to ship cargoes of this type on deck, imposed liability on the ocean carrier. This case was decided before the enactment of ***COGSA***, 46 U.S.C. § 1300, ***et seq.*** There is no issue or dispute in the underlying litigation concerning where or how the cargo of Tia Maria was stored aboard the MORANT BAY. Similarly the decision in ***Nemeth v. General S.S. Corp., Ltd., supra***, is of no value to the Petitioner's position. There, the Ninth Circuit reversed a district court's granting summary judgment limiting the ocean carrier's liability to $500 per package, based upon a determination that there was a material issue of fact in dispute concerning whether the shipper had declared to the ocean carrier that the goods that he was shipping were worth $22,000 creating a situation where he would have paid a higher freight rate, and the ocean carrier would have been deprived of its $500 per package limitation. There is no issue in our case concerning whether Hiram Walker declared the value of the shipment of Tia Maria. A point raised in the ***Nemeth*** case of significance, however, is its holding that:

> Mere negligence in the stowage or handling of cargo, which might be considered an inherent risk of shipping, is not a deviation.

Supra, 694 F.2d 609.

The evidence in the underlying case is clearly that the custom and practice was to effect a gravity transfer of the Tia Maria, when Indian River failed to bring the proper couplings to transfer the cargo by pumping (*See* Pet. App., pp. 77a - 78a), and regrettably the Eller employee negligently left the tank of Tia Maria suspended when he went to get another piece of equipment.

Petitioner in the last section of its brief asks this Court to consider a rule that would virtually open a floodgate of litigation to determine when negligence rises to a sufficient level to constitute a "deviation." Eller would suggest to this Court that would not be a way to clarify the rights and liabilities of the participants in marine transportation. Further, it would be particularly inappropriate in this case, where in the first instance this accident was caused by a failure directly attributed to the cargo owner, i.e., its agent's failure to bring appropriate equipment to the Port of Miami to accomplish transfer of the cargo by pumping. But in any event, there can be no deviation, because there had been a custom and practice between our parties of transferring this cargo by gravity feed. (*See* Pet. App., pp. 13a, 78a)

CONCLUSION

None of the issues raised by the Petitioner warrant review of the underlying litigation by this Court. The litigation below arises out of unique facts concerning how the cargo was shipped and ultimately delivered. There is no important unanswered question in this case and it does not involve a decision of the Eleventh Circuit which is in conflict

with a decision of other circuits. The Petition should be denied.[13/]

Respectfully submitted,

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13/ The Petition should also be denied because Hiram Walker & Sons, Inc. has been previously determined not to be a real party in interest in this litigation.

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(3)

No. 94-1288

In The

Supreme Court of the United States

October Term, 1994

HIRAM WALKER AND SONS, INC.,

Petitioner,

vs.

KIRK LINE, R.B. KIRKONNELL & BRO. LTD.; JAMAICA MERCHANT MARINE ATLANTIC LINE; ELLER & COMPANY INC., INDIAN RIVER TRANSPORT, INC.; AND S.S. MORANT BAY, its engines, boilers, etc.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent's statement of the case in its opposing brief ranges from the innocuous to the insulting. Despite Respondent's reworking of the facts, the record is clear that the answers by all parties to the question of who had the obligation to transfer the liqueur is unimpeached. Only Petitioner had that obligation. Nor is there any dispute that Eller's testimony was that it was in the process of delivering the cargo to Hiram at the time of the loss. That having been said, Petitioner's argument with the Court below is how it dealt with the applicable law. From the inception of this case, Petitioner has consistently advanced the points it makes in this petition.

Petitioner cannot, however, leave unaddressed the innuendo by Respondent that it is by some subterfuge that Petitioner's insurer is not a direct party to this action. It is sufficient for this Court to be advised that both Hiram and Eller were insured as regards this loss, that Eller knew of Aetna's involvement even prior to the commencement of litigation, and that suing in the name of Hiram was proper both by virtue of the insurance contract and the law (83a). Eller knows that the caption of this lawsuit was never amended at its suggestion to include Aetna. There is no basis for Respondent's assertion that Hiram has no standing to bring this Petition. Nor is there any reason for Respondent's inapposite discussion of the consequences of declaring higher values. Under equitable rules of subrogation an insurer is just as entitled to the benefits of maritime law as is its insured, and, in paying the loss is similarly harmed as is the insured merchant.

1. The Court should grant the Petition to resolve the question of the effect of the Harter Act on a contractually extended limit of liability claimed by a terminal operator.

More is said in Respondent's brief by what is not addressed, than by what is, on the question stated above. Conspicuous by its absence is *any* discussion of ***Section 191 of the Harter Act. (46 U.S.C. App. Section 191).*** Nowhere does Eller comment on whether its obligations to properly deliver the cargo were lessened, weakened or avoided by the bill of lading's limitation of liability clause.

Eller argues forcefully that its role was essential to the overall carriage of the cargo because it performed the last act – that of delivery. Why then, does it not tell this Court where it was charged with that task? Where is the touchstone against which its actions can be tested?

It does not dispute the fact that neither the bill of lading, nor the parties, nor the ***Carriage of Goods by Sea Act*** charged it or its principal, Kirk, with the job of delivery. And yet, all concede that such an obligation is of the essence of carriage of goods by sea.

It suggests to this Court, without any citation of authority, believing that saying-makes-it-so, that the ***Harter Act*** has no application to this case. But it is the ***Harter Act*** alone which completes the carriage of goods by sea. For, it alone, obligates the carrier to properly deliver the cargo. And yet Eller, and the Court below, omitted any consideration of, or reference to ***Harter.***

Eller's position that ***COGSA*** applies to this case *ex proprio vigore* is wrong. Eller was not a carrier, and its activities all happened after discharge. ***COGSA***'s provisions applied only as another term of the bill of lading contract. ***Allied Chemical v. Companhia de Navagacao, 775 F.2d 476, 483 (2nd Cir. 1985).*** However, that did not alter the applicability, as a statute, of the ***Harter Act,*** after discharge. And yet Eller, and the Court below relegated ***Harter*** to the dustbin of history in a case where it alone defined Eller's rights and obligations.

Carried to its inevitable conclusion, Respondent's position that ***Harter*** plays no part in this scenario leaves it positing a truncated version of American maritime law, where, after discharge from the ship, anything goes regarding how cargo is handled or delivered. This is so because ***COGSA*** simply does not address that question. ***COGSA*** alone, according to Eller, defined its rights and obligations. But Eller forgets that ***COGSA*** itself, in ***Section 1311 (46 U.S.C. App. Section 1311)*** informs the maritime law that the ***Harter Act*** applies, not ***COGSA,*** " . . . to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded on or after the time they are discharged from the ship."

Only by addressing the intent of ***Harter,*** as regards its effect on Eller's right to limit its liability in the absence of a proper delivery, can this important area of maritime law be settled. That it is unsettled is amply demonstrated by the Respondent's own assertions in this case. Eller does not deny that it failed to make a proper delivery. It just goes on to assert that, having failed in that regard, it

is nevertheless entitled to be rewarded, because the bill of lading extended a $500 limit.

In short, the question is whether the ***Harter Act*** tempers the right to limit liability after discharge. ***Philip Morris v. American Shipping Co. Inc., 748 F.2d 563 (11th Cir. 1984)*** and ***Baker Oil Tools v. Delta, 562 F.2d 938 (5th Cir. 1977)*** squarely held, yes. The Eleventh Circuit below, in the case at bar, held, no.

2. The Court should grant the Petition to resolve this split in the Circuits.

Respondent's attempt to distinguish ***Philip Morris*** and ***Baker*** is disingenuous and misleading. It says that those decisions were based on the Courts' perceived delay of cargo movement. (Resp. p.17) That statement is wrong and has no basis in fact. In ***Philip Morris,*** the decision turned on the carrier's negligence in not protecting the cargo. In fact, the Court specifically held, "Moreover, the delay in the procurement of the cargo was not the cause of the damage." Id. at 567. In ***Baker,*** the carrier was held liable because it lost the cargo. Delay had nothing to do with the decision.

In both cases, full damages were assessed. In both cases ***COGSA*** applied as a contract term. In both cases the loss happened on the pier. In both cases, ***Harter*** governed.

3. The Court should grant the Petition to review the doctrine of "Deviation" as it affects the entire contract of carriage.

Whether the rationale of those cases is founded in deviation, or the prohibitions of ***Harter*** against lessening,

weakening, or avoiding obligations is not clear. The result, however is the same. The carrier is denied a limitation.

While the doctrine of deviation originally grew out of a geographical deviation of the ship from its announced voyage, it has been expanded to include on deck stowage where under deck is expected. ***St. Johns N.F. Shipping Corp. v. S.A. Companhia—Geral Commercial Do Rio de Janeiro, 263 U.S. 119 (1923).*** There is no reason why any deviation from the agreement which exposes cargo to risks greater than agreed to should not result in similar consequences.

Respondent's suggestion that heavy loads are lifted all the time is irrelevant because parties to those transactions expect that such activities are necessary to load or unload the goods. Here, however, the testimony was quite the opposite. Lifting the tank was not expected or bargained for. Everyone understood that the transfer was to be made by pumping. Had the pump or hose leaked and the goods were thus lost there might have been negligence but no deviation. But where, as in *St. Johns*, supra, the breach of the contract "exposed them to greater risk than had been agreed and thereby directly caused the loss," Eller "became liable as for a deviation."

"Deviation" is a consequence driven doctrine. A ship may alter its itinerary often with impunity. But if cargo is lost or damaged thereby, the ship loses its contractual benefits. A carrier may bet that putting cargo on deck instead of in a hold will cause no harm and may do so

often and if no harm befalls the cargo, there is no complaint, but if it loses the bet, it loses its limit. The progression to the case at bar is irresistable. Eller bet that taking an eighteen wheel tank truck airborne in violation of the contract would not result in loss. Many times it won. This time it lost. It alone, not the petitioner or its insurer should bear the loss. The cargo owners in *St. Johns* expected that the goods would rest under deck not on deck; Hiram expected that the goods would rest on wheels not on the blades of a forklift suspended in air.

Respondent argues that lifting the Kirk truck was not dangerous. But Eller's own vice-president testified that it was, using that very term. He said it was dangerous. That, he said, was why he would not have approved of it had he known it was happening. Obviously it was dangerous to leave the truck suspended in space. Obviously Hiram never expected that its goods, moving on a roll-on roll-off vessel would take to the air. That breached its agreement. A deviation resulted.

Distinguishing fact patterns as Eller does, does nothing to enlightened the law of admiralty. Neither does its failure to enlighten this Court as to why its failure to adhere to the contract and properly deliver the cargo after discharge from the ship should entitle it to the limit.

4. The Court should grant the Petition to clarify the intent of *Robert C. Herd & Company, Inc. v. Krawill Machinery Corp., 359 U.S. 297 (1959)*

Even where Respondent addresses the issue it fails to enlighten. The cases are legion where Himalaya clauses, purporting to extend limits to stevedores and others have

been found lacking. Hiram suggests that the clause involved in this case is such a one. A contract provision which lacks clarity is not thereafter imbued with propriety *ex post facto* by the actions of the parties. On its face clause 17 (Pet. p.17) is ambiguous. And it is at the time the contract is made that its efficacy must be judged. It could literally be read to limit the liability of *any* agent, servant or employee performing services, for *anyone,* in connection with the goods. But this Court intended in ***Herd*** to have ***COGSA*** limits run only to the benefit of the ocean carrier's agents who were performing only that carrier's work.

The mischief which the clause in the case at bar has already caused is amply demonstrated by the history of this case. Eller complains that Hiram's suggestion that the clause could be said to apply to Indian River is far-fetched. Yet that is precisely what happened. Early on, in 1986, relying on that clause, Indian River, the trucker hired by Hiram to transfer the liqueur from the Kirk truck to its truck for delivery to New Jersey, in fact did move for summary judgment arguing a right to the $500 limit pursuant to the bill of lading. (Pet. pp.13; 92a). Its motion was denied on other grounds. It thereafter chose to settle the case.

The ultimate question remains unanswered. On its face, is the clause a valid fulfillment of this court's expectations?

CONCLUSION

The Petition for Writ of Certiorari should be granted. This Court, or the Court below, at this Court's direction, should reverse and grant judgment for the full loss.

Respectfully submitted,

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